91-1269

Supreme Court, U.S.
FILED
JAN 21 1992
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

U.S. METROLINE SERVICES, INC.

Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RAY G. BESING
Law Offices of Ray G. Besing, P.C.
Texas State Bar Card 02262000
1100 St. Paul Place
750 N. St. Paul
Dallas, Texas 75201
214/220-9090
214/220-1202 fax

Counsel for Petitioner
U.S. Metroline Services, Inc.

January 21, 1992

Questions Presented

(1) Whether the Circuit Court properly held that the issue of the Respondent's immunity from the antitrust laws had already been decided in favor of Respondent in a prior appeal dealing with an injunction and that it was therefore the "law of the case" in a subsequent appeal dealing with a motion to dismiss.

(2) Whether the threat made by a regulated private telephone company to cut off the local telephone lines essential for a customer to provide metro service in competition with the telephone company's metro service is conduct immune from injunctive relief under the antitrust laws according a proper application of the two-pronged test in *California Retail Dealers Assn. v. Midcal Aluminum, Inc.*, to the Texas Public Utility Regulatory Act.

(3) Whether (A) the relevant market concept in *Cantor v. Detroit Edison Co.* applies, and (B) the filed tariff doctrine does not apply, to a private telephone company's challenged conduct in a competitive market so that the conduct is not shielded from antitrust liability by the telephone company including its activity in a competitive market in a tariff it claims to be filed with the State regulatory agency.

PARTIES TO THE PROCEEDINGS

The two parties are Petitioner, a corporation, and Respondent, a corporation, as named in the Caption.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES CITED	v
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW AND GROUNDS OF JURISDICTION	1
CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
1. The Circuit Court's holding that its decision in a prior appeal regarding the immunity of Southwestern Bell from the antitrust laws is the "law of the case" in a subsequent appeal is clearly erroneous and works a manifest injustice on the Petitioner.	7
2. The decision below endangers national policies protecting and encouraging competition in telecommunications by immunizing from the antitrust laws a major force in that industry, Respondent, in contradiction to decisions of this Court on the state action doctrine, if applied or when applied to the Texas PURA.	9
3. The decision below conflicts with (A) decisions of this Court in applying the state action doctrine to private anticompetitive conduct in a competitive relevant market separate from a regulated monopoly market, and (B) decisions of other Courts of Appeal rejecting antitrust immunity claimed under the filed tariff doctrine.	18

Page

CONCLUSION 25

APPENDIX (Separate Volume)

A. Per Curiam Opinion and Judgment of the Fifth Circuit Court of Appeals (October 23, 1991)
B. District Court's Memorandum Order and Judgment (February 27, 1991)
C. Per Curiam Opinion and Judgment of the Fifth Circuit Court of Appeals (May 29, 1990)
D. Order Denying Motion for Rehearing (July 3, 1990)
E. District Court's Memorandum Order (August 30, 1990)
F. Constitution, Art. VI, cl. 2
G. Sherman Antitrust Act, 15 USCS §§ 2 and 15(a)
H. The Texas Public Utility Regulatory Act (PURA), and legislative intent affidavit
I. Southwestern Bell Financial and Organizational Charts

TABLE OF AUTHORITIES CITED

Page

United States Supreme Court decisions:

324 Liquor Corp v. Duffy,
479 U.S. 335, 341 (1987) 15

California Retail Dealers Assn. v. Midcal Aluminum, Inc.,
445 U.S. 97, 100 S.Ct. 937 (1980) . . . . . i, 15, 16

Cantor v. Detroit Edison Co.,
428 U.S. 579, 96 S.Ct. 3110 (1976) 18-24

Hallie v. Eau Claire,
471 U.S. 34, 47, 105 S.Ct. 1713 (1985) 17

Mayo v. Lakeland Highlands Canning Co.,
309 U.S. 310, 60 S.Ct. 517 (1940) 15

Otter Tail Power Co. v. United States,
410 U.S. 366, 93 S.Ct. 1022 (1973) 14

Parker v. Brown,
317 U.S. 341, 63 S.Ct. 307 (1943) 5, 21, 23

Patrick v. Burget,
108 S.Ct. 1658, 1663 (1988) 15, 17

Southern Motor Carriers Rate Conference v. United States,
105 S.Ct. 1721 (1985) 16, 18

United States v. R.C.A.,
358 U.S. 334, 339-46, 79 S.Ct. 457 22

University of Texas v. Camenisch,
451 U.S. 390, 101 S.Ct. 1830, 183 (1981) 8, 9

United States Courts of Appeal decisions:

Bd. of Trade v. Commodity Futures Trading Comm'n.,
605 F.2d 1016, 1020 (7th Cir. 1979), *cert. denied*, 466
U.S. 928, 108 S.Ct. 197 (1987) 9

Page

City of Angoon v. Hodel, 803 F.2d 1016 (9th Cir. 1986), *cert. denied*, 484 U.S. 870, 108 S. Ct. 197 (1987) 9

City of Kirkwood v. Union Electric Co., 671 F.2d 1173 (8th Cir. 1982) 24-25

Daniel v. Washington County Board of Education, 488 F.2d 82 (5th Cir. 1973) 15

Essential Communications v. American Tel. & Tel. Co., 610 F.2d 1114 (3rd Cir. 1979) 21-25

Kennedy v. City of Cleveland, 797 F.2d 297 (6th Cir. 1986) 8

Knotts v. U.S., 893 F. 2d 758, 761 (5th Cir. 1990) 9

Liffiton v. Keuker, 850 F.2d 73 (2nd Cir. 1988) 7

Marcum v. United States, 621 F.2d 142, 144-45 (5th Cir. 1980) 15

MCI Communications Corp. v. American Telephone & Telegraph Co., 708 F.2d 1081 (7th Cir. 1983) *cert. denied*, 464 U.S. 891, 104 S.Ct. 234 (1983) 6, 14, 22

Midland Telecasting Co. v. Midessa Television Co., 617 F.2d 1141 (5th Cir. 1980) 23

Mid-Texas Communications Systems v. AT&T, 615 F.2d 1372, 1377-82 (5th Cir. 1980) 23

Milgard Tempering, Inc. v. Selas Corp. of America, 901 F.2d 703 (9th Cir. 1990) 7

North Carolina Utilities Commission v. FCC, 552 F.2d 1036 (4th Cir. 1977) 6

Northeastern Telephone Co. v. AT&T, 651 F.2d 76, 82-84 (2nd Cir. 1981) 22

Phonetele, Inc. v. AT&T, 664 F.2d 716, 726-37 (9th Cir. 1981) 22

Page

Scott v. Kuhlmann, 746 F.2d 1377 (9th Cir. 1988) 7

Sierra Club v. U. S. Army Corps of Engineers,
771 F.2d 409 (8th Cir. 1985) 9

United States District Court decisions:

United States v. American Tel & Tel. Co.,
552 F.Supp. 131, 157-159 (D.D.C. 1982) 6, 10

United States v. American Telephone & Telegraph Co.,
461 F.Supp. 1314, 1321-29 (D.D.C. 1978) 23

Texas Supreme Court and Courts of Appeals decisions:

Amtel Communications, Inc. v. PUC,
687 S.W.2d 95 (Tex.App. 3rd Dist. 1985) 12, 13, 16

Public Utility Commission of Texas
v. AT&T Communications, Inc.,
777 S.W.2d 363, 367 (Tex. 1989) 11

Federal and State Regulatory Agency decisions:

Carterfone v. AT&T, 13 F.C.C. 2d 420 (1968) 6

Microwave Communications, Inc.,
18 F.C.C. 2d 953 (1969) 6

Specialized Common Carrier Services,
29 F.C.C. 2d 870 (1971) 6

Texas PUC Docket 5827,
Final Order, November 21, 1984 10

Constitution, Statutes and Rules:

PURA § 2 10

PURA § 3(c)(2)(B) 11

PURA § 3(c)(2) 10, 11

PURA § 18(a) 11

	Page
PURA § 18(a), (c), (e), (f), (g), (h), (k), (l), (m), (n), (o), (p), (q) and (r)	10
PURA § 18(e) and (g)	10, 12
PURA § 45	10
PURA § 47	10
PURA § 89	9, 10
U.S. Constitution, Art. VI, cl. 2	9

PETITION FOR WRIT OF CERTIORARI

U. S. Metroline Services, Inc. respectfully petitions that a writ of certiorari be issued to review an opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW AND GROUNDS OF JURISDICTION

The Per Curiam opinion of the United States Court of Appeals for the Fifth Circuit, entered October 23, 1991, is reprinted as Section A of the separate Appendix at pages 1a-4a. The Memorandum Order of the Northern District of Texas, Dallas Division, was entered on February 27, 1991, and is reprinted as Section B of the separate Appendix at pages 1b-4b.

The Per Curiam Opinion of the United States Court of Appeals for the Fifth Circuit, entered May 29, 1990 and reported at 901 F.2d 1267, is reprinted as Section C of the separate Appendix at pages 1c-3c. The Order of that Court denying Petitioner's Motion for Rehearing (timely filed on June 12, 1990) was entered on July 3, 1990 and is reprinted as Section D of the separate Appendix at page 1d. The Memorandum Order of the United States District Court for the Northern District of Texas, Dallas Division, was entered on August 30, 1989 and is reprinted as Section E of the separate Appendix at pages 1e-10e.

The jurisdiction of this Court is invoked under 28 USCS § 1254(1).

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

The U.S. Constitution, Art. VI, cl. 2; the relevant sections of the Sherman and Clayton Antitrust Acts, 15 USCS §§ 2, 15(a) and 26; the entire Texas Public Utility Regulatory Act, as amended, Art. 1446(c), Tex. Rev. Civ. Stat. Ann. (the "PURA"), together with legislative intent, are printed verbatim as, respectively, Sections F, p. 1f (Constitution); Section G, pp. 1g-2g (Sherman Act); and Section H, pp. 55h-104h [pages are numbered as they appear in the official statute book] (the PURA).

STATEMENT OF THE CASE

In metropolitan areas such as Dallas-Ft. Worth, composed of two or more cities, many businesses sell their products or services throughout the metropolitan area, treating it as one single market, and having a need for frequent calling throughout the metropolitan area, without paying long distance charges. That need is met by a communications service commonly known as "metro service," a service which is neither local telephone service nor long distance telephone service, but is in a third category of those varied communications services provided by several private communications companies. Petitioner is a small communications company which has been providing metro service in the Dallas-Ft. Worth metropolitan area for four years, since early 1988. Petitioner is one of several companies which also provide metro services, competing directly with each other and with metro service provided by Respondent Southwestern Bell. In addition, the Respondent is a monopoly local telephone company and therefore is the sole provider of the local telephone lines essential for one part of the operation of the metro services of all the competitors.

In June, 1989 Respondent Southwestern Bell threatened to cut off all of the Petitioner's inbound and outbound local telephone lines which it had been leasing from Respondent for one and one half years. That action, if taken, would immediately terminate the Plaintiff's business. Respondent's employee Iven testified,

corroborated by the testimony of two other witnesses (R at Tab 19, Plaintiff's Appendix of Relevant Facts, Vol. IV), that the reason for Respondent's threat to terminate the Petitioner's telephone lines was because Petitioner was taking some metro service customers away from Respondent.

Respondent claimed that cutting off the Petitioner's local telephone lines was justified by its "resale prohibition" tariff which it had filed with the Public Utility Commission of Texas (PUC) in connection with the regulation of Respondent's monopoly local telephone service.

Petitioner filed suit in the federal district court, seeking injunctive relief, and alternative damages, under the antitrust laws.[1] The District Court refused to conduct an evidentiary hearing on Petitioner's application for preliminary injunction, instructing the parties to conduct discovery of documents and by depositions and then file briefs supported by excerpts of the discovery evidence. The parties did so. The District Court did not refer to the Record, reciting only claims from the briefs in its Memorandum Order. There is no evidence in the Record of any verified tariffs or of any PUC actions, proceedings or orders approving or reviewing tariffs or the above challenged conduct of Respondent, nor is there any evidence in the Record of any approved rates, rate-making proceedings or orders of the PUC. The evidence showed Petitioner was operating profitably; but that communications customers will leave a communications provider like Petitioner, and not return, if its communications service is interrupted or terminated.

In its August 30, 1989 Memorandum Order (Appendix, Section E), the District Court denied a preliminary injunction, holding that Petitioner could not show the necessary injunctive element of probable success on the merits because the "challenged conduct" was the setting of rates by the PUC and, therefore, the

---

[1]The District Court has jurisdiction pursuant to 28 USCS § 1331, 15 USCS § 15 and, because Petitioner and Respondent are citizens of different States, 28 USCS § 1332(a)(1).

two-pronged test of this Court's *Midcal* decision was satisfied by the Texas PURA. (Appendix, Section E, pp. 5e-7e). There was no evidence in the Record of any PUC rate settings or rate orders.

The court also held that Petitioner could not show irreparable injury because being put out of business, due to termination of a contract at will, could be compensated in money damages. There was no evidence in the Record of any contract at will.

The Circuit Court's *per curiam* opinion affirmed the District Court, holding that the case involved "private state-regulated ratemaking" and, since Respondent clearly meets the *Midcal* tests, "there is no likelihood of success on the merits." (Appendix, Section C, p. 3c at fn. 6). However, the Court also rejected Respondent's argument that the PUC had exclusive original jurisdiction over the "private state-regulated ratemaking" because the complaint alleged an antitrust violation within federal jurisdiction, and "Whether Bell is thus immunized is a federal question to be litigated in federal court." (*Id.*, p. 1c) There was no explanation of these contradictions. The Circuit Court also held that there was no irreparable injury since, if injunctive relief was not granted, the lost goodwill of a terminated business, which had operated over the short period of time of a year and a half, could be compensated with damages at the trial on the merits. (*Id.*, p. 3c). Petitioner's motion for rehearing and suggestion for rehearing en banc were denied on July 3, 1990. (Appendix, Section D). Petitioner subsequently filed with this Court on September 28, 1990, a Petition For Writ of Certiorari, which was denied.

Petitioner then filed a petition in federal court against Respondent for money damages. Subsequently, the trial court granted Defendant's motion to dismiss under Federal Rule 12(b)(6) in its February 27, 1991 Memorandum Order and Final Judgment (R 58 and 59), relying upon its conclusions in its earlier August 30, 1989 Memorandum Order.

The Circuit Court affirmed the District Court's opinion, holding that, in the prior injunction appeal, it had decided the issue of Respondent's immunity from antitrust liability under the

state action doctrine. The Circuit Court held that it already had established the "law of the case." (Appendix, Section A, p. 3a).

REASONS FOR GRANTING THE WRIT

The Circuit Court's use of "the law of the case" to affirm a Rule 12(b)(6) motion to dismiss is in conflict with the decisions of this Court, that Court and other Circuit Courts.

Moreover, the Circuit Court ignored the seriousness of its incursion on the antitrust laws.

After almost 100 years of pervasive and unlawful monopoly conditions in the nation's telecommunications industry—the largest single industry in the United States—the federal courts and the FCC have spent the past 22 years establishing and implementing a national policy which protects and encourages competition in that immense and expanding industry. The decision of the court below, however, undermines that policy and, at the same time, rejects this Court's standards for applying the *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307 (1943), state action exemption from the antitrust laws.

In what is admittedly a small injunction suit by a very small communications company, the courts below nevertheless granted a broad immunity from the antitrust laws to Respondent Southwestern Bell, one of the major forces in the national and international telecommunications and information technology industries.

The magnitude of the immunity wrongfully granted can be measured in part by the magnitude of the Respondent and the scope of its operations in both regulated and competitive arenas.

According to its Annual Report for 1989, Southwestern Bell's assets were $21.2 billion, generating revenues for the year of $8.7 billion and net income of $1 billion. Southwestern Bell's assets are greater than the assets of Westinghouse, Tenneco, Proctor & Gamble, Pepsico, Boeing, Phillips Petroleum, Anheuser-Busch, Monsanto, Goodyear, Coca-Cola or any of a number of other national and multi-national conglomerates. Some of Southwestern

Bell's business operations are conducted by its affiliate corporations, fellow members of the Southwestern Bell "family" engaged in a myriad of businesses on regional, national and international scales. [See the financial and organizational charts at Section I, Appendix].

From the late 1870s to the late 1960s, the entire telecommunications infrastructure was dominated by one company, AT&T and its 22 Bell Operating Companies (*e.g.*, Chesapeake and Potomac Bell, New Jersey Bell, Southwestern Bell) which comprised a unified Bell Telephone System, nationwide.

In 1968, however, the FCC's *Carterfone* decision[2] opened up the telephone equipment markets to free competition. In 1970, the FCC's *MCI* and subsequent *Specialized Carriers*[3] decisions opened up the long distance telephone markets to competition. Providing appropriate injunctive relief and necessary appellate decisions, the federal courts stepped up the enforcement of both FCC Orders and the antitrust laws to provide the necessary legal policy and framework for the growth of competition in telecommunications.[4] The Legislature in Texas also did its part by enacting a modern statute, the PURA.

Passed in 1975, and amended on several occasions since, the Texas PURA is a unique utility regulatory statute, for it announced new policies and provided new tools to accommodate

---

[2]*Carterfone v. AT&T*, 13 F.C.C. 2d 420 (1968).

[3]*Microwave Communications, Inc.*, 18 F.C.C. 2d 953 (1969); *Specialized Common Carrier Services*, 29 F.C.C. 2d 870 (1971), *aff'd sub. nom. Washington Utilities & Transportation Comm'n v. FCC*, 513 F.2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1975).

[4]*E.g.*, *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir. 1977); *United States v. American Telephone & Telegraph Co.*, 552 F.Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001, 103 S.Ct. 1240 (1983); *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th Cir. 1983) *cert. denied*, 464 U.S. 891, 104 S.Ct. 234 (1983). There are a host of other federal decisions in this area, throughout the 1970s and 1980s.

(i) necessary regulation of dominant utilities operating in a monopoly market, on the one hand, with (ii) protections and encouragement of competitive businesses and markets, on the other hand. As the telecommunications industry has rapidly evolved toward competitive markets, the Texas PURA also has evolved, from 1975 through the 1989 session of the Legislature, to mirror the important developments in federal policy. [The text of the PURA is in Section H, Appendix].

1. **The Circuit Court's holding that its decision in a prior appeal of the denial of a preliminary injunction regarding Southwestern Bell's immunity from antitrust liability is "the law of the case" in a subsequent appeal from the granting of a Rule 12(b)(6) motion to dismiss is clearly erroneous and works a manifest injustice on the Petitioner.**

Ordinarily, affirmative defenses such as immunity may not be raised by a motion to dismiss. *Scott v. Kuhlmann*, 746 F.2d 1377 (9th Cir. 1984). Both the trial court and the Circuit Court failed to recognize that, under virtually all factual scenarios, Respondent is not immune from antitrust liability. Whether Respondent even can plead or prevail on a defense of immunity necessarily involves law and fact issues that should be decided on the merits. *Liffiton v. Keuker*, 850 F.2d 73 (2nd Cir. 1988).

In its *per curiam* opinion in the first appeal dealing only with the denial of injunctive relief, the Circuit Court necessarily focused upon the issue on appeal—namely, whether the Plaintiff had established the prerequisites for preliminary injunctive relief. The Circuit Court's *holding* was that Plaintiff had failed to show *irreparable injury* (which was the subject of the bulk of the oral argument before the Panel on April 3, 1990). Whether as an afterthought, a comment or otherwise—but clearly only dictum—Footnote 6 of the Court's *per curiam* opinion did not become the "law of the case." *Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703 (9th Cir. 1990).

By characterizing its decision disposing of the motion for preliminary injunctive relief as the law of the case to a substantive

issue, the Court of Appeals committed clear error. The Circuit Court disregarded the important difference between the tests applicable to a preliminary injunction and the strict test to uphold the granting of a Rule 12(b)(6) motion to dismiss. The district court's grant of the Rule 12(b)(6) motion meant that it necessarily ruled as a matter of law that "it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-56 (1957). This test is far different from the element of "the likelihood of success on the merits," which a plaintiff must establish in order to obtain injunctive relief. *Mississippi Power & Light Co. v. United Gas Pipeline Co.*, 760 F.2d 618, 621 (5th Cir. 1985).

It is error to apply a holding in a preliminary injunction as the law of the case in a subsequent trial (or disposition) on the merits. An argument that a determination made at a preliminary injunction hearing is the law of the case in a subsequent hearing on a motion to dismiss, for example, ignores the difference in tests applicable to a preliminary injunction and a Rule 12(b)(6) motion to dismiss. *Kennedy v. City of Cleveland*, 797 F.2d 297 (6th Cir. 1986), *cert. den'd*, 479 U.S. 1103.

It is clear that the denial of extraordinary relief for lack of a clear and strong showing on the merits, or for a showing that is only preliminary or tentative in nature, does not trigger law of the case consequences.

> "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."
>
> ***
>
> "Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *University of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 1834, 68 L.Ed.2d 175, 180 (1981).

> "Refusal to stay a preliminary injunction pending appeal does not establish the law of the case since it rests on nothing more than a tentative appraisal of the probable result on the merits." *Bd. of Trade v. Commodity Futures Trading Comm'n.*, 605 F.2d 1016, 1020 (7th Cir. 1979), *cert. denied*, 446 U.S. 928, 100 S.Ct. 1866, 64 L.Ed.2d 281 (1980). *See, City of Angoon v. Hodel*, 803 F.2d 1016, 1024 n. 4 (9th Cir. 1986) [determinations made regarding a preliminary injunction do not constitute the law of the case], *cert. denied*, 484 U.S. 870, 108 S.Ct. 197, 98 L.Ed. 2d 148 (1987); *Sierra Club v. U. S. Army Corp of Engineers*, 771 F.2d 409, 413 (8th Cir. 1985) [same].

The Circuit Court's holding clearly is in conflict with the referenced decisions of the Third, Sixth, Seventh, Eighth, Ninth and D.C. Circuits, and particularly with this Court's holding in *University of Texas v. Camenisch, supra.*

Even the Fifth Circuit Court's reliance upon its opinion in *Knotts v. U.S.*, 893 F.2d 758, 761 (5th Cir. 1990)—that an appellate court decision rendered at one stage of a case constitutes the "law of the case" in all succeeding stages—is misplaced. The Court actually stated in *Knotts* that:

> "The scope of the doctrine, however, is limited: it 'applies only to issues that were decided in the former proceeding and does not pertain [to] questions that might have been decided but were not.'" *Id.*, 893 F.2d at 761.

2. The decision below endangers national policies protecting and encouraging competition in telecommunications by immunizing from the antitrust laws a major force in that industry, Respondent, in contradiction to decisions of this Court on the state action doctrine, if applied or when applied to the Texas PURA.

From the beginning, PURA § 89 has directed that the "Act shall be construed to apply so as not to conflict with any authority of the United States." That is consistent with the federal divestiture court's application of the Supremacy Clause to hold

that the court's enforcement of the Sherman Act was not subject to the permission or approval of state utility regulatory commissions.[5]

From the Act's inception, § 47 of PURA has provided:

> "No public utility may discriminate against any person or corporation that sells or leases equipment or performs services in competition with the public utility, nor may any public utility engage in any other practice that tends to restrict or impair such competition."

Indeed, in the purpose clause of the PURA, at § 2, the Legislature made it clear that the preferred "normal forces of competition" do not operate in the areas served by monopoly utility companies; and, to attempt to emulate competitive forces "which operate to regulate prices in a free enterprise society," the Act's purpose is to establish a regulatory system to regulate public utilities in those monopoly areas. Subsequent amendments and court and PUC interpretations of PURA established that the regulatory function of the PUC is to be adjusted and modified *as competition develops* in the varied telecommunications markets, *i.e.*, the PUC's regulatory power is to bear only upon the operations of public utilities in *monopoly* markets.[6]

PURA Sections 3(c)(2); 18(a), (c), (e), (f), (g), (h), (k), (l), (m), (n), (o), (p), (q) and (r); 45; and 100, when read with §§ 2, 47 and 89 already discussed, represent an overriding legislative policy aimed at accomplishing two parallel goals:

> (1) To protect consumers from excessive prices (prices not based on costs) and poor or discriminatory services from

---

[5] *United States v. American Tel & Tel. Co., supra*, 552 F.Supp. at 157-159.

[6] As the PUC said in 1984: "The Commission is of the opinion that where new technologies arise which can thrive only in an unregulated environment, *then regulation should give way* to technology rather than vice-versa . . . . Simply put, the age of technology and competition is upon us and regulation should acknowledge this fact." *Texas PUC Docket 5827, Final Order*, November 21, 1984, *aff'd, Southwestern Bell Telephone Co. v. PUC of Texas*, 735 S.W.2d 663 (Tex.App.—Austin 1987, no writ). (emphasis added.)

telecommunications utilities dominant in a market, *i.e.*, a monopoly market such as local telephone service; and

(2) To permit existing communications companies and "new telecommunications enterprises" to compete openly and fairly in competitive markets--to provide ". . . equal opportunity to all telecommunications utilities [both regulated, dominant companies like Respondent and non-dominant communications companies like Petitioner] in a competitive marketplace." PURA § 18(a).

The Texas Supreme Court expressly held that sections 45 and 47 of the PURA "apply to only the public utility itself and not to the Commission." *Public Utility Commission of Texas v. AT&T Communications, Inc.*, 777 S.W.2d 363, 367 (Tex. 1989). Clearly, the policy of the State is to protect competitors, and competitors as customers of a public utility, from both discriminatory and anti-competitive conduct of a public utility.

Section 18(a) of PURA is an amendment stating the Legislature's intention to further strengthen policies to encourage competition in telecommunications; expressly recognizing the impacts of both technology and "federal, judicial and administrative actions"; and finding that the telecommunications industry "has become and will continue to be in many and growing areas a competitive industry which does not lend itself to traditional public utility regulatory rules, policies and principles."

At the same time, the Legislature delineated between "dominant carriers" and other, small "non-dominant" competitors in the telecommunications industry, by amending the definition of "public utility" in Section 3(c)(2) of the Act. By that amendment, the Legislature provided for the continued regulation of dominant carriers [any company: (i) providing a communications service and which ". . . has sufficient market power in a telecommunications market . . . to enable such [company] to *control prices in a manner adverse to the public interest* for such service in such market."; or (ii) providing "*local exchange telephone service*." PURA § 3(c)(2)(B) [emphasis added]. That

same section expresses the intent *not* to regulate [except for reporting requirements] other, non-dominant providers of, broadly, "communications services."

Additionally, Sections 18(e) and (g), amendments added by the Legislature in 1987, direct the PUC to make rules and establish procedures which are: "*applicable to local exchange companies for determining the level of competition in specific telecommunications markets and submarkets . . .*" and which "*. . . balance* the public interest in a *technologically advanced telecommunications system providing a wide range of new and innovative services . . . prohibiting anticompetitive practices, and preventing the subsidization of competitive services with revenues from regulated monopoly services.*" PURA §§ 18(e) and (g) (Excerpts and emphasis added).

Thus, the Texas Legislature, in four different sessions of the Legislature from 1975 through 1987, adopted and amended the PURA in a manner to clearly articulate a pervasive and expanding policy promoting both the development and the protection of competition in telecommunications. A reading of the PURA as a whole establishes that the Legislature sought to achieve two policies:

(1) The regulation of monopoly utilities only to the extent necessary to protect the public; and

(2) The fostering of competition in telecommunications to the greatest extent possible, in those various areas and activities where the public can benefit from higher technology and innovative communications services at lower prices - the very hallmarks of the competitive marketplace. Those policies were discussed by the Texas Court of Appeals in *Amtel Communications, Inc. v. PUC*, 687 S.W.2d 95 (Tex. App 3 Dist. 1985):

> "First, PURA requires that the Commission implement a public policy that *monopoly power* of a public utility shall be held only under State license and *exercised under State regulatory control.* The statute requires, *concurrently*, that the agency implement a contrary *public policy in favor of*

> *competition.* Second, the Commission must under PURA implement a public policy against discrimination in utility services while, in some instances and in some degree, the agency may implement a policy of discrimination based upon the public interest." 687 S.W.2d at 99 (emphasis added).

First, the court construed the PURA as a statement of state policy to the effect that a monopoly public utility can *exercise* its monopoly power *only under State regulatory control*, that is, a monopoly utility is *not to act as a monopoly* except under the *regulatory* control of the Texas PUC. Then the Court construed the PURA as establishing a "concurrent" public policy favoring and protecting competition in the telecommunications industry. That latter policy of the State has been emphasized and expanded in the 1985 and 1987 amendments of PURA, *supra.*

After analyzing the sections of the PURA dealing with the regulation of the *proper exercise* of monopoly power by a utility, the *Amtel* court then stated:

> "On the other hand, PURA contains other provisions that are distinctly "antitrust" in nature and reflect a definite public policy *in favor of competition* as a regulating or controlling force applicable to public utilities. In these particular instances, it is plain that the *PURA does not insulate a public utility from the forces of competition and, indeed, prohibits anticompetitive practices by the utility.* [citing, Section 18(a) and Section 47 of the Act]." 687 S.W.2d at 100 (emphasis in original and added).

Yet, the court below did exactly the reverse by deciding to "insulate a public utility from the forces of competition" and by immunizing "anticompetitive practices by the utility."

In the modern, high-technology telecommunications industry, there are few monopoly markets left - the major one being the provision of ordinary local telephone service in a town or city by a regulated telephone company under a state statute and a municipal franchise. Because the local telephone companies have monopolies, they are "dominant carriers" and their monopoly services are regulated by the Texas PUC. In contrast, there are a

large number of competitive markets in which there are a growing number of competitive providers of a large variety of telecommunications services - cellular mobile telephone services; paging ("beeper") services; providers of complete telephone systems and services shared by all of the tenants of the new "smart" office buildings; fiber optic carriers; miscellaneous common carriers; private system carriers; and metro services companies, among others.

Respondent's local telephone lines are the only telephone lines which *all* competing service companies [*e.g.*, long distance companies, paging companies, mobile telephone companies and metro service companies] must use; they are "bottleneck" facilities.

This Court held in *Otter Tail Power Company v. United States*, 410 U.S. 366, 93 S.Ct. 1022 (1973), that Otter Tail Power Company must allow municipalities access to its existing transmission lines so that the municipalities could construct their own electrical systems. Thus, this Court held that Otter Tail could not use its monopoly power to foreclose the competition of the municipal electrical systems. That decision articulated what has come to be known as the "essential facilities doctrine," namely, that a business which controls a facility that cannot reasonably be duplicated and to which access is necessary in order for others to compete, has an obligation to provide its competitors with access to the facility. When applied to the case here, *Otter Tail* mandates that the Petitioner be allowed access to Respondent's telephone lines. *See also MCI Communications Corporation v. American Telephone and Telegraph Company*, 708 F.2d 1081 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 234 (1983).

In reviewing the applicability of the state action immunity to a state statute allowing a liquor price fixing system, this Court first noted a threshold question before proceeding to apply to either prong of the *Midcal* test.

> "The 'threshold question,' in this case as in *Midcal*, is whether the State's pricing system is inconsistent with the antitrust laws." *324 Liquor Corp v. Duffy*, 479 U.S. 335, 341 (1987), citing *Midcal, infra*, footnote 7, 445 U.S. at 102.

Here, the Texas PURA is *not* inconsistent with the antitrust laws of the United States, and the court below should have gone no further in its attempt to apply *Midcal* to this case.

Nevertheless, had the court below proceeded to analyze the PURA, it should have readily concluded that the PURA meets neither the first nor the second prongs of the *Midcal* test.[7]

The text of the *per curiam* opinion below is devoid of any suggestion that the court analyzed either the expressed or implied policies of the State of Texas, in the PURA or in the cited court and agency case decisions interpreting the Act.[8]

---

[7]For the first prong, a court must find that the anticompetitive conduct complained of, the "challenged restraint," must be conduct which is "clearly articulated and affirmatively expressed as state policy." *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 at 105 (1980).

For the second prong, a court must find that the State exercises "...ultimate control over the challenged anticompetitive conduct...that State officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with State policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes State policy, rather than merely the party's individual interests." *Patrick v. Burget*, 108 S.Ct. 1658, 1663 (1988).

[8]Both courts below substantially departed from accepted judicial proceedings by ignoring the Record after refusing an evidentiary hearing and then relying largely on the briefs of Respondent to present mere conclusions and arguments as the contradictory and erroneous "facts" appearing in the Opinion (*e.g.*, Section I and fns. 3, 4 and 5, Appendix, Section C, p. 1c). The "clearly erroneous" test on appeal does not apply here and Petitioner was entitled to a full review of the Record on appeal. *See, Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 60 S.Ct. 517 (1940); *Marcum v. United States*, 621 F.2d 142, 144-45 (5th Cir. 1980); *Daniel v. Washington County Board of Education*, 488 F.2d 82 (5th Cir. 1973).

Selectively reciting only the *rate-making* sections of PURA, as the district court did (Appendix, Section E, pp. 5e-7e) entirely ignores the policies favoring competition which led the Texas Supreme Court to conclude that "the PURA does *not* insulate a public utility from the forces of competition." *Amtel, supra*, p. 11-12.

The courts below cannot point to any policy of the State which remotely suggests that Respondent's threat to put Petitioner out of business is the kind of "challenged restraint" on competition which is "clearly articulated and affirmatively expressed as state policy." *Midcal, supra*, footnote 7.

Moreover, both courts below wrongly relied upon *Southern Motor Carriers Rate Conference v. United States*, 105 S.Ct. 1721 (1985), for this Court was dealing there with "an anticompetitive regulatory system" which permitted large "rate bureaus" of motor carriers to collectively engage in price-fixing agreements. In discussing its decisions in *Midcal*, this Court stated that the first prong of the *Midcal* test is satisfied:

> "As long as the State as sovereign *clearly intends to displace competition in a particular field with a regulatory structure* . . ." *Id.*, 105 S.Ct. at 1731 (emphasis added).

Neither court below demonstrated that it found in the PURA, the court and agency interpretations or the circumstances surrounding Respondent's conduct any clear intention by Texas to "displace competition" in the telecommunications field in general or in the competitive metro services market in particular.

As for the second prong of the *Midcal* test, there is nothing in either the PURA or the Record which suggests that Texas or the PUC actively supervises any policy permitting Respondent's conduct.

Obviously, the PUC's supervision of a monopoly public utility's rates in public hearings is far removed from that kind of active review and approval or disapproval of a private party's challenged anticompetitive conduct this Court spoke of in *Patrick v. Burget, supra*, footnote 7.

The court below entirely ignored the most recent opinions of this Court applying the second prong of the *Midcal* test—*Hallie v. Eau Claire*, 471 U.S. 34, 47, 105 S.Ct. 1713 (1985) and *Patrick v. Burget*, 108 S.Ct. 1658, 1663 (1988). In *Patrick*, quoting from *Hallie*, this Court clearly articulated the standard to be applied to the "active supervision" requirement of *Midcal*:

> "The active supervision requirement stems from the recognition that "*[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.*" *Hallie v. Eau Claire*, 471 U.S. 34, 47, 105 S.Ct. 1713, 1720, 85 L.Ed. 2d 24 (1985); *See Id.*, 45, 105 S.Ct., at 1719-1720 ("*a private party . . . may be presumed to be acting primarily on his or its own behalf*"). The requirement is designed to ensure that the state action doctrine will shelter *only* the *particular* anticompetitive acts of private parties that, in the judgment of the State, *actually furthers state regulatory policies. Id.*, at 46-47, 105 S.Ct. at 1720. To accomplish this purpose, the active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct . . . . The active supervision prong of the *Midcal* test requires that State officials *have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with State policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes State policy, rather than merely the party's individual interests.*" 108 S.Ct. at 1663 (emphasis added).

The Respondent and the court below did not address how it is that Respondent's threatened conduct [cutting off the Plaintiff's telephone wires and unilaterally interpreting and applying its own tariff to justify the disconnection] furthers any governmental interest of the State of Texas in any "clearly articulated and affirmatively-expressed State policy." Nor did the court below address or find that the State of Texas had any mechanism to actually exercise any power to review "particular anticompetitive

acts of private parties and disapprove those that fail to accord with State policy." Neither the Respondent nor the court below cite any acts or policies of the Texas Legislature or any reviews, investigations or proceedings ever initiated by the PUC to review or approve any anticompetitive conduct by Respondent or anyone else; that job has been left to the courts.

3. The decision below conflicts with (A) decisions of this Court in applying the state action doctrine to private anticompetitive conduct in a competitive relevant market separate from a regulated monopoly market, and (B) decisions of other Courts of Appeal rejecting antitrust immunity claimed under the filed tariff doctrine.

A. Regarding the first prong of the *Midcal* test, this Court's decision in *Southern Motor Carriers, supra*, should not have been relied upon for the decision below for another, significant reason—this Court's emphasis on the *relevant market*:

> ". . . in *Cantor* the anticompetitive acts of a private utility were held unprotected because the Michigan Legislature had indicated no intention to displace competition in the relevant market. 421 U.S., at 584-585, 96 S.Ct., at 3114, 3115." *Southern Motor Carriers, supra*, 105 S.Ct. at 1731.

Petitioner submits that this Court's decision in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110 (1976) is controlling here, but ignored by the court below. *Cantor* dealt with a public utility industry—electricity—which is far less subject to either changes in technology or competition than the telecommunications industry. *Cantor* involved one isolated competitive area of the electricity industry, the supplying of light bulbs. The plaintiff-petitioner, a competitive supplier of light bulbs, charged that the effect of Detroit Edison's bulb supply program was to foreclose competition in a substantial segment of a *competitive* market. In *Cantor* this Court considered Detroit Edison's claims which were virtually identical to Respondent's claims below.

This Court said that previous decisions had already decided that state authorization, approval, encouragement or participation in anticompetitive private conduct confers no antitrust immunity. In each of the cases cited by the Court, the initiation and enforcement of the restrictive program under attack involved:

> "... *a mixture of private and public decision-making*. In each case, notwithstanding the State participation in the decision, *the private party exercised sufficient freedom of choice* to enable the Court to conclude that he should be held responsible for the consequences of his decision.
>
> The case before us also discloses a program which is the product of a decision in which both the Respondent [Detroit Edison] and the Commission participated .... Nevertheless, there can be no doubt that the option to have, or not to have, such a program is primarily *Respondent's*, not the Commission's .... There is nothing unjust in a conclusion that Respondent's participation in the decision is sufficiently significant to require that its conduct implementing the decision, like comparable conduct by unregulated businesses, conform to applicable federal law. Accordingly, even though there may be cases in which the State's participation in a decision is so dominant that it would be unfair to hold a private party responsible for his conduct in implementing it, this record discloses no such unfairness." *Id.*, 428 U.S. at 595, 96 S.Ct. at 3119 (emphasis added).

This Court rejected the very argument made by Respondent to, and accepted by, the court below. This Court further stated:

> "First, merely because certain conduct may be subject both to state regulation and to the federal antitrust laws does not necessarily mean that it must satisfy inconsistent standards; second, even assuming inconsistency, we could not accept the view that the federal interest must inevitably be subordinated to the State's. And finally, even if we were to assume that Congress did not intend the antitrust laws to apply to areas of the economy primarily regulated by a State, that assumption would not foreclose the enforcement of the antitrust laws in

an essentially unregulated area such as the market for electric light bulbs." *Id.*, 428 U.S. at 595, 96 S.Ct. at 3120.

The Court acknowledged that there may be some examples of economic regulation in which the very purpose of the government control is to avoid the consequences of competition.

"But all economic regulation does not necessarily suppress competition. On the contrary, public utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation. *There is no logical inconsistency between requiring such a firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy* . . . . The mere possibility of conflict between state regulatory policy and federal antitrust policy is an insufficient basis for implying an exemption from the federal antitrust laws. Congress could hardly have intended state regulatory agencies to have broader power than federal agencies to exempt private conduct from the antitrust laws . . . .

The Court has consistently refused to find that regulation gave rise to an implied exemption without first determining that exemption was necessary in order to make the regulatory Act work, "and even then only to the minimum extent necessary."

The application of that standard to this case inexorably requires rejection of respondent's claim. For Michigan's regulatory scheme does not conflict with federal antitrust policy and, conversely, if the federal antitrust laws should be construed to outlaw respondent's light bulb exchange program, there is no reason to believe that Michigan's regulation of its electric utilities will no longer be able to function effectively. Regardless of the outcome of this case, Michigan's interest in regulating its utility's distribution of electricity will be almost entirely unimpaired.

> We conclude that neither Michigan's approval of the tariff filed by respondent, nor the fact that the lamp-exchange program may not be terminated until a new tariff is filed, is a sufficient basis for implying an exemption from the federal antitrust laws for that program." *Id.*, 428 U.S. at 595-599, 96 S.Ct. at 3120-3121. (emphasis added).

Since the *Cantor* decision in 1976, 33 years after the *Parker* decision in 1943, there has been no decision by this Court or a Circuit Court which contradicts the holdings and the reasoning in *Cantor*.

Using regulated customer tariffs in an unregulated area as an excuse to force out a competitor is private activity in a competitive market, and is unlawful.

By allowing Defendant Bell to write and file its customer rates with the PUC, or by the PUC approving those rates for Bell's customers, the State of Texas did not give Bell immunity for its misconduct towards its competitors, nor did Texas, in any manner, declare that misconduct to be lawful.

B. With respect to the second prong of the *Midcal* test, the court below succumbed to the filed tariff doctrine in its erroneous application of the state action exemption, after wrongly assuming that Respondent's claimed tariff had been filed with and approved by the PUC.

In *Essential Communications v. American Tel. & Tel. Co.*, 610 F.2d 1114 (3rd Cir. 1979), the court presented a brief history of the development of antitrust policy and the growth of competition in the telecommunications industry, including an analysis of the federal Act and the limitations on the filed tariff doctrine. As that court pointed out, the tariff scheme in *both* federal and state regulatory systems is:

> ". . . designed essentially for the *protection of telephone users* in a rather limited way from discrimination in rates or service and from excess charges . . . .
>
> AT&T's primary obligation under the 1934 Act [federal] is to adhere, in its dealings with customers, to its filed tariffs. That

primary obligation is the heart of public utility regulation, because if carriers were free to depart from filed tariffs, the prohibition against discrimination among customers could be evaded. *However, the filed tariff rule has little or nothing to do with AT&T's duties under the antitrust laws toward its competitors* in the equipment supply business; *competitors are not the intended beneficiaries of that rule of public utility regulation.* This distinction was recognized over 50 years ago by Justice Brandeis in the leading case of *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed 183 (1922).

In this case the plaintiff is not suing in the capacity of a customer for communications services. Essential seeks recovery for injury to its business or property from actions taken by the defendants in formulating a tariff, and in rendering customer services. The Bell System will not be asked to disgorge to any customers any revenues derived under the filed tariff. Indeed, it can continue to collect those revenues until a new tariff is filed. There is no policy conflict, actual or potential, therefore, between the section 4 Clayton Act remedy and the antidiscrimination purposes of the filed tariff rule." 610 F.2d at 1120-22 (emphasis added).

The court rejected AT&T's claim of implied immunity from the antitrust laws, merely because AT&T's rates and tariffs were filed with or approved by the FCC.

It is well settled that the federal Communications Act of 1934 (which contains *no* section expressly protecting competition as does the Texas Act) provides *no* implied immunity from the antitrust laws. *United States v. R.C.A.*, 358 U.S. 334, 339-46, 79 S.Ct. 457; *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 597 n. 36, 96 S.Ct. 3110 (1976); *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1101-05 (7th Cir. 1983), *cert. denied* 104 S.Ct. 785 (1983); *Phonetele, Inc. v. AT&T*, 664 F.2d 716, 726-37 (9th Cir. 1981), *cert. denied*, 459 U.S. 1145, 103 S.Ct. 785 (1983); *Northeastern Telephone Co. v. AT&T*, 651 F.2d 76, 82-84 (2nd Cir. 1981), *cert. denied*, 455 U.S. 943, 102 S.Ct. 1438 (1982);

Mid-Texas Communications Systems v. AT&T, 615 F.2d 1372, 1377-82 (5th Cir. 1980), *cert. denied* 449 U.S. 9112, 101 S.Ct. 286 (1980); *United States v. American Telephone & Telegraph Co.*, 461 F.Supp. 1314, 1321-29 (D.D.C. 1978). *See*, in particular, the language of the court below in *Midland Telecasting Co. v. Midessa Television Co.*, 617 F.2d 1141 (5th Cir. 1980), at pp. 1145-46.

The court in *Essential Communications*, *supra*, then rejected the filed tariff doctrine, reversing the district court's dismissal of the plaintiff's Section 16 injunction action, holding that: ". . . the complaint should not have been dismissed on the ground that the FCC tariffs made the defendants' activities exempt from antitrust scrutiny." 610 F.2d at 1124.

Then, the court also rejected AT&T's claim to immunity under the *Parker v. Brown* "state action" doctrine, based on AT&T's claim that its actions also were permitted by *state tariff filings* (exactly as Petitioner contended below):

> "There are several difficulties with this argument. The first is that the typical state regulatory scheme is essentially no different than that of the 1934 Act. It permits carriers to initiate tariffs, requires them to adhere strictly thereto in dealing with their customers, and permits their revision, in the interest of the customers, by a state regulatory agency. The analysis which we made with respect to any conflict between federal antitrust law and federal utility regulation in Part II is equally applicable here. A second, and we think insurmountable objection, is the holding in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed. 2d 1141 (1976) *that the provisions of utility initiated tariff filings do not furnish a predicate for* a *Parker v. Brown exemption from antitrust claims by competitors* injured as a result of compliance with the tariffs. The court's analysis in *Cantor* is entirely consistent with that which we made in Part II [the implied immunity issue above]. . .

> We hold only that neither the FCC nor the state tariff regulatory schemes provide a basis for an implied exemption from those laws." *Id.* at 1125-26 (emphasis added).

In *City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173 (8th Cir. 1982), the court also rejected the filed rate doctrine in a price-squeeze antitrust claim against a regulated electric utility company, even though the electric company was subject to pervasive regulatory schemes of both federal (Federal Energy Regulatory Commission) and state (Missouri Public Service Commission) regulatory agencies, and even though the price squeeze complained of by the plaintiff *arose from the federal and state rate-making tariffs* filed by the electric company. The court pointed out that an award of antitrust damages for a price squeeze would not conflict with the filed-rate rule's purpose,

> ". . . which is to ensure rate uniformity by confining the authority to oversee the reasonableness of rates to a single regulatory agency. See *Arkla*, 101 S.Ct. at 2930 [*Arkansas Louisiana Gas Co. v. Hall* (Arkla), 453 U.S. 571, 101 S.Ct. 2925 (1981)]. . . . *The filed-rate doctrine does not preclude antitrust liability in the case at bar. An award of antitrust damages for a price squeeze would not conflict with the doctrine's purpose . . . . In contrast, Kirkwood does not quarrel with the reasonableness determinations of the FERC and PSC* as to any individual wholesale or retail rate. *Instead, Kirkwood complains of anti-competitive effects resulting from the interaction of rates which, taken separately, may be reasonable . . . .*
>
> Another consideration bolsters our conclusion that the filed-rate doctrine does not apply. The Third Circuit noted in *Essential Communications Systems, Inc v. American Tel. & Tel. Co.*, 610 F.2d 1114, 1121 (3rd Cir. 1979) that the doctrine was created to protect customers, not competitors . . . . Kirkwood alleges that it has been injured as a competitor, not as a customer, though it stands in both relations to UE (the defendant electric company). *A rule formulated to ensure uniformity of rates as between customers*

should not give an unfair advantage to a utility in its dealings with competitors." *Id.* at 1179 (emphasis added).

The foregoing analysis directly applies to this case.

CONCLUSION

The decision below conflicts with decisions of this Court and other Circuit Courts on important federal questions and conflicts with decisions of Courts of Appeals themselves on the same issues. Both courts below departed so far from the accepted and usual course of judicial proceedings that this Court's power of supervision should be exercised. For the reasons stated in this Petition, Petitioner respectfully prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

LAW OFFICES OF RAY G. BESING, P.C.

By _____
Ray G. Besing
Texas Bar Card No. 02262000

1100 St. Paul Place
750 N. St. Paul
Dallas, Texas 75201
214/220-9090
214/220-1202 fax

Counsel for Petitioner
U. S. Metroline Services, Inc.

Dated: January 21, 1992

91-1269

(2)

Supreme Court, U.S.
FILED
JAN 21 1992
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

U.S. METROLINE SERVICES, INC.,

Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

APPENDIX

TO THE
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RAY G. BESING
Law Offices of Ray G. Besing, P.C.
Texas State Bar Card 02262000
1100 St. Paul Place
750 N. St. Paul
Dallas, Texas 75201
214/220-9090
214/220-1202 fax

Counsel for Petitioner
U.S. Metroline Services, Inc.

January 21, 1992

NOTE: Rule 29.1 listing of all parent companies and subsidiaries of Respondent, Southwestern Bell Telephone Company is in Section I of this Appendix. Petitioner, U.S. Metroline Services, Inc., has no parent companies and no subsidiaries.

SECTION A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-1364
Summary Calendar

DFW METRO LINE SERVICES, a Texas Partnership, now known as U.S. METRO LINE SERVICES, INC.,

Plaintiff-Appellant,

versus

SOUTHWESTERN BELL TELEPHONE CORPORATION, a Missouri Corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas
(CA 3 89 1698 G)

(October 23, 1991)

Before CLARK, Chief Judge, WILLIAMS, and BARKSDALE, Circuit Judges.

PER CURIAM:*

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

U.S. Metro Line Services, Inc. (formerly DFW Metro Line Services) (DFW) appeals the district court's denial of DFW's motion for new trial or rehearing, motion for court directives, and motion for leave to amend complaint. The district court denied these motions after granting the Rule 12(b)(6) motion to dismiss filed by Southwestern Bell Telephone Company (Bell). We affirm.

II.

The recitation of facts is taken in large part from the court's prior opinion in DFW Metro Line Serv. v. S.W. Bell Telephone Co., 901 F.2d 1267 (5th Cir. 1990).

DFW offers a form of telephone service (flat-rate calling between Dallas and Fort Worth, sometimes called "metro service") that is also offered by Southwestern Bell. As part of the equipment for its metro service, DFW uses telephone lines that it leases from Bell. DFW filed suit for injunctive relief or damages after Bell informed DFW that Bell would discontinue its line leasing to DFW unless DFW began paying Bell much higher monthly rates reflecting access charges.

Bell's stated reason for requiring higher rates was that the lower rates that DFW had been paying were applicable only to companies using the lines for Radio Common Carrier services according to Bell's tariff approved by the Texas Public Utilities Commission (PUC). Bell stated that, to comply with its PUC approved tariff, it was required to charge DFW the higher rate applicable to the "resale" type of service for which (Bell had just learned) DFW was using the leased lines. DFW argued that

Bell's tariff argument was just a sham to cover Bell's real motive to drive out DFW as a competitor in the metro service market.

Discovery proceeded while a temporary restraining order issued by the district court was in effect. The district court denied DFW's application for preliminary injunction. We affirmed, holding that DFW failed to make the threshold showing of irreparable injury, and further stating:

> As an additional basis for our holding, we find that Southwestern Bell is immune from the antitrust liability alleged in DFW's complaint under the "state action" doctrine enunciated in Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943), as applied to private state-regulated ratemaking by *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 105 S.Ct.21, 85 L. Ed. 2d 36 (1985). Southwestern Bell clearly meets the two prong test set out in *California Retail Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980). There is no, therefore, likelihood of success on the merits in the instant case.

DFW Metro Line Serv. v. S.W. Bell Telephone Co., 901 F.2d 1267, 1269 n.6 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 519 (1990).

After the trial court granted Bell's 12(b)(6) motion to dismiss, DFW filed a motion for new trial or rehearing, for court directives, and for leave to amend the complaint. DFW appeals from the trial court's denial of all of these motions.

III.

"An appellate court decision rendered at one stage of the case constitutes 'the law of the case' in all succeeding stages." *Knotts v. United States*, 893 F.2d 758, 761 (5th Cir. 1990). Our holding that "Bell is immune from the antitrust liability alleged" established the law of this case. Since the same liability is now reasserted, Bell is immune from liability here.

IV.

The judgment of the district court is
AFFIRMED.

SECTION B

IN THE UNITED STATES COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DFW METRO LINE SERVICES, a Texas Partnership,	§	
Plaintiff,	§	CIVIL ACTION NO.
VS.	§	CA 3-89-1698-G
SOUTHWESTERN BELL TELEPHONE COMPANY, a Missouri Corporation,	§	
Defendant	§	

MEMORANDUM ORDER

This case is before the court on the motion of defendant Southwestern Bell Telephone Company ("Southwestern Bell") to dismiss the complaint of plaintiff DFW Metro Line Services ("Metro Line") for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons stated below, Southwestern Bell's motion is granted.

1. Background

Southwestern Bell and Metro Line are both involved in the telecommunications industry, and offer a form of telephone service that allows flat-rate calling between Dallas and Fort Worth, Texas. For Metro Line to provide this service, it must use telephone lines that it leases from Southwestern Bell. In June, 1989, Southwestern Bell claims to have discovered that Metro

Line was paying a monthly rate for telephone lines that was much lower than the rate normally charged to companies leasing telephone lines for Metro Line's intended purpose. Southwestern Bell informed Metro Line that it would discontinue leasing these lines to Metro Line unless Metro Line began paying the higher rate. Metro Line then filed this suit, alleging that Southwestern Bell's activity violated federal antitrust laws and requesting injunctive relief and damages.

On August 30, 1989, this court denied Metro Line's motion for a preliminary injunction. That decision was affirmed on appeal in DFW Metro Line Services v. Southwestern Bell Telephone Co., 901 F.2d 1267 (5th Cir.), *cert. denied*, _____ U.S. _____ , 111 S.Ct. 519 (1990).

II. Analysis

Rule 12(b)(6) of the Federal Rules of Civil Procedure empowers a court to dismiss a complaint if it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957)' Jamieson by and through Jamieson v. Shaw, 722 F.2d 1205, 1209 (5th Cir. 1985).

In the instant case, Southwestern Bell argues that it is immune from Metro Line's antitrust claims under the state action doctrine. The Supreme Court developed the state action doctrine in Parker v. Brown, 317 U.S. 341 (1943), to protect some state restraints on competition from liability under the Sherman Act. The current test for determining whether the state action doctrine will bar a particular antitrust claim was set out by the Supreme Court in

California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), and has two parts. First, "the challenged restraint must be 'one clearly' articulated and affirmatively expressed as state policy'"; second, the state must actively supervise any private anti-competitive conduct. 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987) (citing *Midcal*, 445 U.S. at 105).

In its August 30, 1989 memorandum order, this court applied the *Midcal* test here and concluded that the state action doctrine immunized Southwestern Bell from Metro Line's antitrust claims (Memorandum Order at 5). In its opinion affirming this court's denial of injunctive relief, the Fifth Circuit agreed:

> As an additional basis for our holding, we find that Southwestern Bell is immune from the antitrust liability alleged in [Metro Line's] complaint under the "state action" doctrine enunciated in Parker v. Brown, 317 U.S. 341 (1943), as applied to private state-regulated ratemaking by Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48 (1985). Southwestern Bell clearly meets the two-prong test set out in California Retail Dealers Association v. Midcal Aluminum, Inc. 445 U.S. 97 (1980). There is no, therefore, likelihood of success on the merits in the instant case.

DFW Metro Line, 901 F.2d at 1269 n.6.

Nothing in this case has caused the court to alter its previously stated conclusion that the state action doctrine immunizes Southwestern Bell from Metro Line's antitrust claims. Indeed, the recent opinion of the District Court for the Southern

District of Florida in Davis v. Southern Bell Telephone & Telegraph Company, 1991 WL 15126 (S.D.Fla. February 4, 1991) (available on WESTLAW) only confirms the correctness of that conclusion. *Davis* involved antitrust claims against Southern Bell, in whose favor the court granted summary judgment on the basis of the state action doctrine.

III. Conclusion

The state action doctrine immunizes Southwestern Bell from Metro Line's antitrust claims. Accordingly, Southwestern Bell's motion to dismiss for failure to state a claim is **GRANTED** and Metro Line's complaint is hereby **DISMISSED** with prejudice.

SO ORDERED.

February 27, 1991.

/s/

A. JOE FISH
United States District Judge

SECTION C

DFW METRO LINE SERVICES,
A Texas Partnership
Plaintiff-Appellant

v.

SOUTHWESTERN BELL TELEPHONE CO.,
A Missouri Corp.,
Defendant-Appellee

No. 89-1835.

United States Court of Appeals.
Fifth Circuit.

May 29, 1990.

Lessee of telephone lines brought action against competitor lessor seeking injunctive relief on basis of antitrust violations. The Untied States District Court for the Northern District of Texas, A. Joe Fish, J., denied relief. Lessee appealed. The Court of Appeals held that any potential injuries suffered by lessee could be calculated and recompensed in the form of damages.

Affirmed.

1. Federal Courts 208

Federal court had jurisdiction over action brought by lessee of telephone lines against lessor, although lessor contended that Texas Public Utilities Commission had exclusive original jurisdiction over disputes involving public utility tariffs, where lessee was alleging violation of federal antitrust laws.

2. Monopolies 24(7)

Traditional prerequisites for injunctive relief are applicable to antitrust cases.

3. Monopolies 24(7)

Any potential injury to lessee of telephone lines due to lessor's raising monthly rates, including lessee's going out of business, could be calculated and recompensed in form of damages; therefore, lessee, which had contended that raising of monthly rates by lessor competitor was a violation of antitrust law, failed to establish irreparable harm and was not entitled to injunctive relief.

4. Monopolies 12(16), 24(7)

Telephone company was immune from antitrust liability alleged in competitor's complaint under "state action" doctrine as applied to private state-regulated rate making, and, therefore, competitor failed to establish likelihood of prevailing on merits of its antitrust claim and was not entitled to injunctive relief.

Ray G. Besing, Ray G. Besing & Associates, Dallas, Tex., for plaintiff-appellant.

Donna Lynn Snyder, Southwestern Bell Telephone Co., Curt Frisbie, Gardere & Wynne, Dallas, Tex., for defendant-appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before CLARK, Chief Judge, and WISDOM and SMITH, Circuit Judges.

PER CURIAM:

I

Plaintiff/appellant DFW Metro Line Services (DFW) offers a form of telephone service (flat-rate calling between Dallas and Forth Worth, sometimes called "metro service") that is also offered by Southwestern Bell (Bell).[1] As part of the equipment for its metro service, DFW uses telephone lines that it leases from Bell. DFW filed suit for injunctive relief or damages after Bell, on June 8, 1989, informed DFW that Bell would discontinue its line leasing to DFW unless DFW began paying Bell much higher monthly rates reflecting "access charges."[2]

Bell's stated reason for requiring DFW to pay higher rates was that the lower rates that DFW had been paying were applicable only to companies using the lines for Radio Common Carrier (RCC) services[3] according to Bell's tariff approved by the Texas Public Utilities Commission (PUC).[4]

---

[1]A third company, not a party to this case, also offers metro service between Dallas and Fort Worth.

[2]The price for use of the lines would rise from approximately $5,000 to approximately $77,000 a month.

[3]RCC services include services such as one-way paging, as distinct from the regular two-way telephone calling involved in metro service.

[4]Southwestern Bell, like other telecommunications common carriers, is required under Texas's Public Utility Regulatory Act (PURA) to file proposed tariffs describing all rates, regulations and services before a service can be offered to the public. PURA § 32. The PUC then must review such rates, regulations and services, and approve the proposed tariff only if its terms are fair and reasonable. PURA §§ 18, 35, 37, 38. An approved tariff has the force and effect of law. Carter v. AT&T Co., 365

Bell stated that, to comply with its PUC-approved tariff, it was required to charge DFW the higher rate applicable to the "resale" type of service for which (Bell had just learned[5]) DFW was using the lease lines. DFW argues that Bell's tariff argument is just a sham to cover Bell's real motive to drive out DFW as a competitor in the metro service market.

Discovery in this case proceeded while a temporary restraining order issued by the district court was in effect. Based on the parties' written submissions to the court, the district court on August 30, 1989 filed a Memorandum Order denying DFW's application for preliminary injunction. DFW appeals from that denial.

II

[1] Bell argues that the federal courts do not have jurisdiction over this case because PUC has exclusive original jurisdiction over disputes involving Texas's public utility tariffs. Bell's argument begs the question. DFW's complaint alleges a violation of the federal antitrust laws, an allegation that brings the case within federal jurisdiction. The PUC has exclusive jurisdiction only if Bell is immunized from antitrust liability by the state action doctrine of *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). Whether Bell is thus immunized is a federal question to be litigated in federal court.

III

[2-4] To obtain a preliminary injunction, a movant must show: 1) a substantial likelihood of success on the merits, 2) a substantial threat that irreparable injury will result if the

---

F.2d 486, 496 (5th Cir. 1966).

[5]Bell alleges that it had previously understood that DFW was using the lines for one-way paging service.

injunction is not granted, 3) that the threatened injury outweighs the threatened harm to the non-movant, and 4) that granting the injunction is not adverse to the public interest. The traditional prerequisites for injunctive relief are applicable to antitrust cases. *See, Mississippi Power & Light Co. v. United States Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985); *Canal Authority v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974). *See also Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95, 98 (5th Cir.) *cert. denied*, 486 U.S. 1023, 108 S.Ct. 1996, 100 L.Ed.2d 228 (1988). The district court in this case found that the plaintiff, DFW, failed to make any of those four showings necessary for a preliminary injunction. Because we agree that DFW failed to make the threshold showing of irreparable injury, we affirm the district court's order.[6]

There can be no irreparable injury where money damages would adequately compensate a plaintiff. *See Spiegel v. City of Houston*, 636 F.2d 997, 1001 (5th Cir. 1981); *Parks v. Dunlop*, 517 F.2d 785, 787 (5th Cir. 1975). The lost goodwill of a business operated over a short period of time is usually compensable in money damages.[7] *See Jack Kahn Music Co., Inc. v. Baldwin Piano & Organ Co.*, 604 F.2d 755, 763 (5th CIr. 1979); *Hardin v. Houston Chronicle*

---

[6]As an additional basis for our holding, we find that Southwestern Bell is immune from the antitrust liability alleged in DFW's complaint under the "state action" doctrine enunciated in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), as applied to private state-regulated ratemaking by *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985). Southwestern Bell clearly meets the two-prong test set out in *California Retail Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). There is no, therefore, likelihood of success on the merits in the instant case.

[7]DFW Metro had only been in business for one and a half years at the time this suit was filed.

Publishing Co., 426 F.Supp. 1114, 1117-18 (S.D.Tex.1977), *aff'd*, 572 F.2d 1106 (5th Cir. 1978). DFW has not shown, nor even argued, that special circumstances in this case would make money damages inadequate should DFW prevail in an adjudication of this case on the merits. The district court correctly observed that, because any potential injury suffered by DFW (including its going out of business) could be calculated and recompensed in the form of damages, DFW did not prove a likelihood of irreparable injury. We therefore AFFIRM the district court's denial of a preliminary injunction in this case.

SECTION D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-1835

DFW METRO LINE SERVICES,
A Texas Partnership,
Plaintiff-Appellant,

versus

SOUTHWESTERN BELL TELEPHONE COMPANY,
A Missouri Corporation,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

Filed July 3, 1990

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 5/29/90)

Before CLARK, Chief Judge, WISDOM and SMITH, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on hearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ John Minor Wisdom
United States Circuit Judge

SECTION E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DFW METRO LINE SERVICES,
a Texas partnership,
Plaintiff,

vs. CA 3-89-1698-G

SOUTHWESTERN BELL TELEPHONE
COMPANY, a Missouri corporation,
Defendant.

MEMORANDUM ORDER

This case is before the court on plaintiff's motion for a preliminary injunction. For the reasons stated below, the court is of the opinion that the motion should be denied.[1]

I. Background

Defendant Southwestern Bell Telephone Company ("Bell") offers its customers Extended Metropolitan Services ("EMS"), which allows them to make unlimited telephone calls throughout the Dallas-Fort Worth metroplex (i.e., across area code boundaries) without incurring long distance charges. EMS is priced on a flat, monthly charge using local telephone lines and telephone numbers. It is this service that is at issue in this case.

The origins of this dispute can be traced back to 1982.

---

[1]This memorandum will constitute the findings of fact and conclusions of law required by F.R. Civ. P. 52(a).

At that time, Bell leased phone lines to DFW Communications, a licensed radio common carrier owned by Greg Cunningham ("Cunningham"), for the purpose of providing one way paging. Bell provided these services under the general exchange tariff for RCC-DID service. The rates for RCC-DID service, set by the Texas Public Utilities Commission, are lower than those in the general access tariff. DFW Communications went into bankruptcy during 1987.

Cunningham, along with Douglas and Prudence Laird, then formed the plaintiff, DFW Metro Line Services ("DFW"). Using a Northern Telecom switch, DFW could connect its leased phone lines together. In late 1987, DFW began using the liens to offer its "Metro Line" service in direct competition with Bell's EMS. The lines themselves were transferred in May 1988 from DFW to Jim Rucker, a more credit-worth associates of Cunningham. Using the switch program, DFW was providing its service at a price much lower than Bell's EMS.

According to Bell, it did not discover DFW's service until it conducted an audit in late 1988 and early 1989. In any event, by letter of March 9, 1989 Bell objected to DFW's use of the lines to provide metro service. On June 9, 1989, after several discussions, Bell sent DFW a notice of termination, stating that it would terminate service on July 11, 1989. Bell was willing for service to continue if DFW would pay the higher access rate for interexchange carriers as provided in the access service tariff. This higher access rate would, however, correspondingly increase DFW's cost of doing business.

DFW filed this suit on July 6, 1989, alleging claims under the Sherman Antitrust Act, 15 U.S.C. § 2, and seeking injunctive relief under the Clayton Act, 15 U.S.C. § 26. It also alleged a violation of the Texas Public Utility Regulatory Act, Texas Rev. Civ. Stat. Ann. Art. 1446c, § 47, which prohibits discrimination, and a claim of tortious interference. On July 10, 1989, the court granted DFW's motion for a

temporary restraining order. DFW now moves for preliminary injunction.

II. Analysis

To obtain a preliminary injunction, a movant must show: (1) a substantial likelihood of success on the merits; (2) a substantial threat that irreparable injury will result if the injunction is not granted; (3) the threatened injury outweighs the threatened harm to the non-movant; and (4) granting the injunction is not adverse to the public interest. Mississippi Power & Light Co. v. United Gas Pipe Line Co., 760 F.2d 618, 621 (5th Cir. 1985); Canal Authority of State of Florida v. Callaway, 489 F.2d 567, 572 (5th Cir. 1974). The decision to grant or deny a preliminary injunction is left to the sound discretion of the district court. A preliminary injunction is an extraordinary remedy which should only be granted if the movant has clearly carried its burden of persuasion on all of the four factors. Mississippi Power & Light, above, 760 F.2d at 621.

In the Fifth Circuit, the same standard is applied to a motion for a preliminary injunction under the Clayton Act. Phototron Corporation v. Eastman Kodak Company, 842 F.2d 95, 98 (5th Cir.) cert. denied, ____ U.S.____, 108 S.Ct. 1996 (1988).

A. Substantial Likelihood of Success

DFW has failed to demonstrate a substantial likelihood of success on the merits, a key element in seeking a Clayton Act preliminary injunction. Phototron, 842 F.2d at 98.

In Parker v. Brown, 317 U.S. 341 (1943), the Supreme Court held that the Sherman Act was not designed to prohibit states from imposing restraints on competition. Southern Motor Carriers RAte Conference, Inc. v. United States, 471 U.S. 48, 55 (1985). While Parker involved an action against a state official, it is equally applicable to suits against private parties. Southern Motor, 471 U.S. at 56-57; Woolen v. Surtran Taxicabs, Inc., 801 F.2d 159, 163-64 (5th Cir. 1986),

cert. denied, 480 U.S. 931 (1987).

Nevertheless, Parker immunity is not automatic. Rather, the seminal case of California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), set out a two prong test for determining such immunity. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'"; second, the state must actively supervise any private anti-competitive conduct. 324 Liquor Corp. v. Duffy, 479 U.S. 335, _____, 107 S.Ct. 720, 725 (1987) (citing Midcal, 445 U.S. at 105); Southern Motor Carriers, 471 at 59 (citing Midcal); Woolen, 801 F.2d at 163.[2]

In the present case, both prongs of the Midcal test have been met. The first prong of Midcal requires that the activity be undertaken pursuant to a clearly articulated state policy, such as a policy approved by a state legislature. Southern Motor, 471 U.S. at 63. A case similar to this one is Sonitrol of Fresno, Inc. v. American Telephone & Telegraph Company, 629 F.Supp. 1089 (D.D.C. 1986). There plaintiffs alleged that defendants, American Telephone and the "Baby Bell" companies, manipulated tariffs and restructured pricing to prevent plaintiffs from competing in the remote alarm services market. The court found that the states involved had a clearly articulated policy to regulate telephone rates, as they set the pricing. 629 F.Supp. at 1091-92, 1094.

Texas has clearly articulated a policy to regulate telephone rates. In § 18 of the Public Utility Regulatory Act ("PURA"), Tex.Rev.Civ.Stat. Art. 1446c (Vernon Supp. 1989), the legislature has stated that there is a policy of

---

[2]DFW relies on Sound, Inc. v. American Telephone & Telegraph Company, 631 F.2d 1324 (8th Cir. 1980). However, as the Eighth Circuit later explained, Sound has been "superseded" by Southern Motor and 321 Duffy. See Health Care Equalization Committee v. Iowa Medical Society, 851 F.2d 1020, 1024 (8th Cir. 1988).

overseeing the telecommunications industry so as to promote competitiveness, and that the Public Utilities Commission ("PUC") shall regulate all telecommunications rates so as to ensure that they are just, fair, and reasonable. The statute also provides that the PUC shall have exclusive original jurisdiction over the business and property of the telecommunications utilities. Id. Moreover, § 18(c)(2) provides that the PUC shall investigate as needed to insure competitiveness within the telecommunications market. Likewise, § 37 provides that the PUC shall set rates, and § 43 states that no utility may make any rate changes unless the PUC approves them. Thus, the challenged activity, namely, the setting of lower rates for RCC-DID service and much higher rates for general access service, has been undertaken pursuant to state policy.[3]

DFW appears to suggest that because Bell proposed its tariffs and rate classifications to the PUC, there is no state action. However, it is the PUC which, after investigation, independently makes the ultimate determination.[4]

The second Midcal prong requires the state to actively supervise the private anti-competitive conduct. The above-cited sections of the PURA demonstrate active supervision. The PURA invests the PUC with the power to "insure compliance with the obligation of public utilities" under the PURA. Art.

---

[3]IntraLATA, i.e., intrastate RCC services, are governed by the state commission. See Bell's Appendix U (Podraza deposition exhibits 2 and 3). Such services are at issue in this case.

[4]For Parker to apply, Texas need not compel the anti-competitive conduct in order but may only permit it. As the Supreme Court stated in Southern Motor, "a state policy that may be 'clearly articulated' within the meaning of Midcal." 471 U.S. at 61 (emphasis in original). See also Sonitrol, 629 F.Supp. at 1094. The PURA evinces a policy which expressly permits the conduct at issue. The PUC regulates the rates and classifications. Utilities may come before it with proposal, but it is the PUC itself which makes the determination after investigation.

1446c § 37. The PURA fixes and regulates rates, "including rules and regulations for determining the classification of customers and services and for determining the applicability of rates." Id. The PUC must insure that any rate made, demanded, or received is just and reasonable. Id. § 38. If existing rates are unreasonable or violate any provision of law, the PUC determines the just and reasonable rate after notice and a hearing. Id. § 42. As previously stated, the PUC closely oversees any changes in rates, and such rates must be approved by the PUC after a hearing. Id. § 43. THe burden of proof regarding rates remains at all times on the utility. Id. § 40.

Under this Texas regulatory scheme, the PUC actively supervises Bell's conduct.[5] As discussed above, the PUC establishes the rates, which must meet the "just and reasonable" standard. It reviews and investigates pricing. The PUC closely oversees rate changes, and must alter existing rates which are unreasonable or violative of law.[6]

For these reasons, Parker immunity applies to this case. It necessarily follows that DFW has not demonstrated a

---

[5]The Supreme Court has identified certain factors which demonstrate "active supervision." The state must establish the prices. It must review the reasonableness of prices proposed by private parties. It may not simply authorize the private actors to set prices as they wish, and then merely enforce those prices. See 324 Liquor Corp., 479 U.S. at ____, 107 S.Ct. at 725-26 (discussing Midcal, 445 U.S. at 105-06); Woolen, 801 F.2d at 164 (same).

[6]Bell's reasons for proposing the differing classification and rate is not material. The focus of the Midcal test "is not on the actions of the defendants before the state commissions but on the states' level of supervision of defendants' anticompetitive conduct." Sonitrol, 629 F.Supp. at 1095.

substantial likelihood of success on the merits.[7]

B. Irreparable Injury

This factor presents a closer question than success on the merits. If DFW does not obtain the injunction sought, it is likely to go out of business, given the much higher general access tariff rate. DFW's business cannot operate without Bell's telephone lines -- which is the likely result if DFW is unable to pay the higher general access rate.

In Hardin v. Houston Chronicle Publishing Co., 434 F.Supp. 54 (S.D. Tex. 1977), aff'd, 572 F.2d 1106 (5th Cir. 1978), the defendant Chronicle, in anticipation of setting up a new distribution system, gave notice that it was terminating all existing newspaper distributorships. Plaintiffs, two such distributors, sought a preliminary injunction against the termination and new plan, alleging that they violated the

---

[7]DFW also argues, in Section B-2 of its brief, that federal law preempts state law, noting that its switch has been approved and registered with the Federal Communications Commission. The FCC Rule provides that such terminal equipment may be directly connected to the public switched telephone equipment. 47 C.F.R. Part 68 §68.100. DFW then contends that the FCC, rather than the states, regulates the right to connect to the public switched telephone network. It cites numerous interconnection cases in support of this argument.

The present case, however, does not involve the issue of whether the Northern TElecom switch can be connected to Bell's network. Bell has not disputed the use of such switches. Rather, Bell argues that if DFW is going to use the lines connected to the switch to provide Metroline service, it must pay the access service rates. This distinguishes the cases cited by DFW. See, e.g., Sound, Inc. v. American Telephone & Telegraph, 631 F.2d 1324, 1329-30 (8th Cir. 1980) (Bell's prevention of connection of non-Bell equipment to its networks violated Communications Act); North Carolina Utilities Commission v. Federal Communications Commission, 537 F.2d 787, 791 (4th CIr.), cert. denied, 429 U.S. 1027 (1976) (prevention of such connection violated the Communications Act); Hush-a-Phone Corporation v. United States, 238 F.2d 266 (D.D. Cir. 1956) (seminal case holding that prevention of connection violated the Communications Act).

antitrust laws. The court nevertheless denied the preliminary injunction because there was no irreparable injury. It held that monetary damages could adequately compensate plaintiffs for their loss:'

> Plaintiffs have argued they will suffer irreparable injury if the injunction is not granted. Since the contracts under which plaintiffs were operating their businesses were terminable at will by either party on fifteen days' notice and there was no discrimination in the terminations, the terminations were a foreseeable risk of doing business. The Court, therefore, finds that the plaintiffs have failed to show irreparable injury. Id. 434 F.Supp. at 57.

The court came to a like conclusion in Hardin v. Houston Chronicle Publishing Co., 426 F.Supp. 1114 (S.D. Tex. 1977), aff'd 572 F.2d 1106 (1978). Plaintiffs argued that their terminations, if not enjoined, would result in permanent loss of customers, as well as loss of their distributorship. The court concluded that these losses would not per se constitute irreparable injury. Rather, plaintiffs were required to show that the loss could not be measured in money damages. 426 F.Supp. at 1117-8. The Fifth Circuit affirmed the trial court's decision in both cases, finding that plaintiffs had not demonstrated irreparable injury. 572 F.2d at 1108.

DFW has not shown irreparable injury in this case. Like the distributors in Hardin, it has argued merely that it will be put out of business, losing customers and good will. Like those distributors, it has made no showing that monetary damages would be inadequate. Rather, DFW has simply asserted that irreparable injury will per se result from denial of the injunction. This is insufficient under Hardin. Moreover, as in Hardin, 434 F.Supp. 54, the contract at issue here was terminable at will, so that termination was a foreseeable risk.

C. Balancing the Equities

As noted above, denial of the injunction may very well

cause DFW to cease operation. On the other hand, if Bell is compelled to continue service at the RCC-DID rate, it will earn less money than if DFW paid the general access rate and may not be able to recover those moneys from DFW if it prevails on the merits. Although it is debatable which of these is a greater hardship, a preliminary injunction is not warranted because DFW has not clearly carried its burden of persuasion on this factor, as well as on those above.

D. Public Interest

This factor is essentially neutral.

III Conclusion

DFW has failed to meet its burden on a motion for a preliminary injunction. Therefore, the motion is DENIED.

SO ORDERED.

August 30, 1989.

/s/ A. JOE FISH
United States District Judge

SECTION F

U.S. Constitution, Art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

SECTION G

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest. Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only–

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or

representative acted intentionally for delay, or otherwise acted in bad faith;
(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and
(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

SECTION H

Art. 1446c. Public Utility Regulatory Act

ARTICLE I. SHORT TITLE, LEGISLATIVE POLICY, AND DEFINITIONS

Short title

Section 1. This Act may be referred to as the "Public Utility Regulatory Act."

Legislative policy and purpose

Sec. 2. This Act is enacted to protect the public interest inherent in the rates and services of public utilities. The legislature finds that public utilities are by definition monopolies in the areas they serve; that therefore the normal forces of competition which operate to regulate prices in a free enterprise society do not operate; and that therefore utility rates, operations and services are regulated by public agencies, with the objective that such regulation shall operate as a substitute for such competition. The purpose of this Act is to establish a comprehensive regulatory system which is adequate to the task of regulating public utilities as defined by this Act, to assure rates, operations, and services which are just and reasonable to the consumers and to the utilities.

Definitions

Sec. 3. (a) The term "person," when used in this Act, includes natural persons, partnerships of two or more persons having a joint or common interest, mutual. or cooperative associations, water supply or sewer service corporations, and corporations, as herein defined.

(b) The term "municipality," when used in this Act, includes cities and incorporated villages or towns existing, created, or organized under the general, home-rule, or special laws of the state.

(c) The term "public utility" or "utility," when used in this Act, includes any person, corporation, river authority, cooperative corporation, or any combination thereof, other than a municipal corporation or a water supply or sewer service corporation, or their lessees, trustees, and receivers, now or hereafter owning or operating for compensation in this state equipment or facilities for:

(1) producing, generating, transmitting, distributing, selling, or furnishing electricity ("electric utilities" hereinafter) provided, however, that this definition shall not be construed to apply to or include a qualifying small power producer or qualifying cogenerator, as defined in Sections 3(17)(D) and 3(18)(C) of the Federal Power Act, as amended (16 U.S.C. Sections 796(17)(D) and 796(18)(C));

(2)(A) the conveyance, transmission, or reception of communications over a telephone system as a dominant carrier as hereinafter defined ("telecommunications utilities" hereinafter); provided that no person or corporation not otherwise a public utility within the meaning of this Act shall be deemed such solely because of the furnishing or furnishing and maintenance of a private system or the manufacture, distribution, installation, or maintenance of customer premise communications equipment and accessories; and provided further that nothing in this Act shall be construed to apply to telegraph services, television stations, radio stations, community antenna television services, or radio-telephone services that may be authorized under the Public Mobile Radio Services rules of the Federal Communications Commission, other than such radio-telephone services provided by wire-line telephone companies under the Domestic Public Land Mobile Radio Service and Rural Radio Service rules of the Federal Communications Commission; and provided further that interexchange telecommunications carriers (including resellers of interexchange telecommunications services), specialized communications common carriers, other resellers of

communications, other communications carriers who convey, transmit, or receive communications in whole or in part over a telephone system, and providers of operator services as defined in Section 18A(a) of this Act (except that subscribers to customer-owned pay telephone service shall not be deemed to be telecommunications utilities) who are not dominant carriers are also telecommunications utilities, but the commission's regulatory authority as to them is only as hereinafter defined;

(B) "dominant carrier" when used in this Act means (i) a provider of any particular communication service which is provided in whole or in part over a telephone system who as to such service has sufficient market power in a telecommunications market as determined by the commission to enable such provider to control prices in a manner adverse to the public interest for such service in such market; and (ii) any provider of local exchange telephone service within a certificated exchange area as to such service. A telecommunications market shall be statewide until January 1, 1985. After this date .the commission may, if it determines that the public interest will be served, establish separate markets within the state. Prior to January 1, 1985, the commission shall hold such hearings and require such evidence as is necessary to carry out the public purpose of this Act and to determine the need and effect of establishing separate markets. Any such provider determined to be a dominant carrier as to a particular telecommunications service in a market shall not be presumed to be a dominant carrier of a different telecommunications service in that market.

(3) The term "public utility" or "utility" shall not include any person or corporation not otherwise a public utility that furnishes the services or commodity described in any paragraph of this subsection only to itself, its employees, or tenants as an incident of such employee service or tenancy, when such service or commodity is not resold to or used by

others. The term "electric utility" shall not include any person or corporation not otherwise a public utility that owns or operates in this state equipment or facilities for producing, generating, transmitting, distributing, selling, or furnishing electric energy to an electric utility, if the equipment or facilities are used primarily for the production and generation of electric energy for consumption by the person or corporation.

(d) The term "rate," when used in this Act, means and includes every compensation, tariff, charge, fare, toll, rental, and classification, or any of them demanded, observed, charged, or collected whether directly or indirectly by any public utility for any service, product, or commodity described in Subdivision (e) of this section, and any rules, regulations, practices, or contracts affecting any such compensation, tariff, charge, fare, toll, rental, or classification.

(e) The word "commission," when used in this Act, means the Public Utility Commission of Texas, as hereinafter constituted.

(f) Repealed by Acts 1983, 68th Leg., p. 1222, eh. 263, § 25, eff. Sept. 1, 1983.

(g) The term "regulatory authority," when used in this Act, means, in accordance with the context where it is found, either the commission or the governing body of any municipality.

(h) "Affected person" means any public utility affected by any action of the regulatory authority, any person or corporation whose utility service or rates are affected by any proceeding before the regulatory authority, or any person or corporation that is a competitor of a public utility with respect to any service performed by the utility or that desires to enter into competition.

(i) "Affiliated interest" or "affiliate" means:

(1) any person or corporation owning or holding, directly or indirectly, five percent or

more of the voting securities of a public utility;

(2) any person or corporation in any chain of successive ownership of five percent or
more of the voting securities of a public utility;

(3) any corporation five percent or more of the voting securities of which is owned or
controlled, directly or indirectly, by a public utility;

(4) any corporation five percent or more of the voting securities of which is owned or controlled, directly or indirectly, by any person or corporation that owns or controls, directly or indirectly, five percent or more of the voting securities of any public utility or by any person or corporation in any chain of successive ownership of five percent of such securities;

(5) any person who is an officer or director of a public utility or of any corporation iii any chain of successive ownership of five percent or more of voting securities of a public utility;

(6) any person or corporation that the commission, after notice and hearing, determines actually exercises any substantial influence or control over the policies and actions of a public utility, or over which a public utility exercises such control, or that is under common control with a public utility, such control being the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of another, whether such power is established through ownership or voting of securities or by any other direct or indirect means; or

(7) any person or corporation that the commission after notice and hearing determines is actually exercising such substantial influence over the policies and action of the public utility in conjunction with one or more persons or corporations with which they are related by ownership or blood relationship, or by action in concert, that together they are affiliated with such public utility within the meaning of this section, even

though no one of them alone is so affiliated.

(j) "Allocations" means, for all utilities, the division of plant, revenues, expenses, taxes, and reserves between municipalities or between municipalities and unincorporated areas, where such items are used for providing public utility service in a municipality, or for a municipality and unincorporated areas.

(k) "Commissioner" means a member of the Public Utility Commission of Texas.

(l) "Cooperative corporation" means any telephone or electric cooperative corporation organized and operating under the Telephone Cooperative Act (Article 1528c, Vernon's Texas Civil Statutes) or the Electric Cooperative Corporation Act (Article 1528b, Vernon's Texas Civil Statutes).

(m) "Corporation" means any corporation, joint-stock company, or association, domestic or foreign, and its lessees, assignees, trustees, receivers, or other successors in interest, having any of the powers or privileges of corporations not possessed by individuals or partnerships, but shall not include municipal corporations unless expressly provided otherwise in this Act.

(n) "Facilities" means all the plant and equipment of a public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with the business of any public utility.

(o) "Municipally-owned utility" means any utility owned, operated, and controlled by a municipality or by a nonprofit corporation whose directors are appointed by one or more municipalities.

(p) "Order" means the whole or a part of the final disposition, whether affirmative, negative, injunctive, or declaratory in form, of the regulatory authority in a matter other than rulemaking, but including issuance of certificates of

convenience and necessity Ind ratesetting.

(q) "Proceeding" means any hearing, investigation, inquiry, or other fact-finding or decision-making procedure under this Act and includes the denial of relief or the dismissal of a complaint.

(r) "Separation" means, for communications utilities only, the division of plant, revenues, expenses, taxes, and reserves, applicable to exchange or local service where such items are used in common for providing public utility service to both local exchange service and other service, such as interstate or intrastate toll service.

(s) "Service" is used in this Act in its broadest and most inclusive sense, and includes any and all acts done, rendered, or performed and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities in the performance of their duties under this Act to their patrons, employees, other public utilities, and the public, as well as the interchange of facilities between two or more of them. Service shall not include the printing, distribution, or sale of advertising in telephone directories.

(t) "Test year" means the most recent 12 months for which operating data for a public utility are available and shall commence with a calendar quarter or a fiscal year quarter.

(u) "Water supply or sewer service corporation" means a nonprofit, member-owned corporation organized and operating under Chapter 76, Acts of the 43rd Legislature, 1st Called Session, 1933, as amended (Article 1434a, Vernon's Texas Civil Statutes).

(v) "Local exchange company" means a telecommunications utility certificated to provide local exchange service within the state.

Applicability of Administrative Procedure and Texas Register Act

Sec. 4. The Administrative Procedure and Texas

Register Act applies to all proceedings under this Act except to the extent inconsistent with this Act. Communications of members and employees of the commission with a party, a party's representative, or other persons are governed by Section 17 of that Act.

ARTICLE II. ORGANIZATION OF COMMISSION; OFFICE OF PUBLIC UTILITY COUNSEL

Creation of commission; appointment and terms; chairman

Sec. 5. A commission, to be known as the "Public Utility Commission of Texas" is hereby created. It shall consist of three commissioners, who shall be appointed to staggered, six-year terms by the governor, with the advice and consent of two-thirds of the members of the senate present, and who shall have and exercise the jurisdiction and powers herein conferred upon the commission. Each commissioner shall hold office until his successor is appointed and qualified. At its first meeting following the biennial appointment and qualification of a commissioner, the commission shall elect one of the commissioners chairman. Appointments to the commission shall be made without regard to the race, creed, sex, religion, or national origin of the appointees.

Application of Sunset Act

Sec. 5a. The Public Utility Commission of Texas and the Office of Public Utility Counsel are subject to the Texas Sunset Act (Chapter 325, Government Code). Unless continued in existence as provided by that Act, the commission and the Office of Public Utility Counsel are abolished and this Act expires September 1, 1993.

Qualifications; oath and bond; prohibited activities

Sec. 6. (a) To be eligible for appointment as a

commissioner, a person must be a qualifies voter, not less than 30 years of age, a citizen of the United States, and a resident of the State of Texas. No person is eligible for appointment as a commissioner if at any time during the two-year period immediately preceding his appointment he personally served as an officer, director, owner, employee, partner, or legal representative of any public utility or any affiliated interest, or he owned or controlled, directly or indirectly, stocks or bonds of any class with a value of $10,000, or more in a public utility or any affiliated interest. Each commissioner shall qualify for office by taking the oath prescribed for other state officers and shall execute a bond for $5,000 payable to the state and conditioned on the faithful performance of his duties. A person who is required to register as a lobbyist under Chapter 305, Government Code, may not serve as a member of the commission or public utility counsel or act as the general counsel to the commission.

(b) No commissioner or employee of the commission may do any of the following during his period of service with the commission:

(1) have any pecuniary interest, either as an officer, director, partner, owner, employee, attorney, consultant, or otherwise, in any public utility or affiliated interest, or in any person or corporation or other business entity a significant portion of whose business consists of furnishing goods or services to public utilities or affiliated interests, but not including a nonprofit group or association solely supported by gratuitous contributions of money, property or services

(2) own or control any securities in a public utility or affiliated interest, either directly or indirectly;

(3) accept any gift, gratuity, or entertainment whatsoever from any public utility or affiliated interest, or from any person, corporation, agent, representative, employee, or other business entity a significant portion of whose business consists of furnishing goods or services to public utilities or

affiliated interests, or from any agent, representative, attorney, employee, officer, owner, director, or partner of any such business entity or of any public utility or affiliated interest; provided, however, that the receipt and acceptance of any gifts, gratuities, or entertainment after termination of service with the commission whose cumulative value in any one-year period is less than $100 shall not constitute a violation of this Act.

(c) The prohibited activities of this section do not include contracts for public utility products and services or equipment for use of public utility products when a member or employee of the commission is acting as a consumer.

(d) No commissioner or employee of the commission may directly or indirectly solicit or request from or suggest or recommend to, any public utility, or to any agent, representative, attorney, employee, officer, owner, director, or partner thereof, the appointment to any position or the employment in any capacity of any person by such public utility or affiliated interest.

(e) No public utility or affiliated interest or any person, corporation, firm, association, or business that furnishes goods or services to any public utility or affiliated interest, nor any agent, representative, attorney, employee, officer, owner, director, or partner of ally public utility or affiliated interest, or any person, corporation, firm, association, or business furnishing goods or services to any public utility or affiliated interest may give, or offer to give, any gift, gratuity, employment, or entertainment whatsoever to any member or employee of the commission except as allowed by Subdivision (3) of Subsection (b) of this section, nor may any such public utility or affiliated interest or any such person, corporation, firm, association, or business aid, abet, or participate with any member, employee, or former employee of the commission in any activity or conduct that would constitute a violation of this subsection or Subdivision (3) of Subsection (b) of this section.

(f) It shall not be a violation of this section if a member

of the commission or a person employed by the commission, upon becoming the owner of any stocks or bonds or other pecuniary interest in a public utility or affiliated interest under the jurisdiction of the commission otherwise than voluntarily, informs the commission and the attorney general of such ownership and divests himself of the ownership or interest within a reasonable time. In this section, a "pecuniary interest" includes income, compensation and payment of any kind, in addition to ownership interests. It is not a violation of this section if such a pecuniary interest is held indirectly by ownership of an interest in a retirement system, institution, or fund which in the normal course of business invests in diverse securities independently of the control of the commissioner or employee.

(g) Repealed by Acts 1987, 70th Leg., eh. 150, § 3, eff. Aug. 31, 1987.

(h) No member of the commission may seek nomination or election to any other civil office of the State of Texas or of the United States while he is a commissioner. If any member of the commission files for nomination for or election to any civil office of the State of Texas or of the United States, his office as commissioner immediately becomes vacant, and the governor shall appoint a successor.

(i) No commissioner shall within two years, and no employee shall, within one year after his employment with the commission has ceased, be employed by a public utility which was in the scope of the commissioner's or employee's official responsibility while the commissioner or employee was associated with the commission.

(j) During the time a commissioner or employee of the commission is associated with the commission or at any time after, the commissioner or employee may not represent a person, corporation, or other business entity before the commission or a court in a matter in which the commissioner or employee was personally involved while associated with the

commission or a matter that was within the commissioner's or employee's official responsibility while the commissioner or employee was associated with the commission.

(k) The commission shall require its members and employees to read this section and as often as necessary shall provide information regarding their responsibilities under applicable laws relating to standards of conduct for state officers and employees.

Grounds for removal; validity of actions

Sec. 6A. (a) It is a ground for removal from the commission if a member:

(1) does not have at the time of appointment the qualifications required by Section 6 of this Act for appointment to the commission; or

(2) does not maintain during the service on the commission the qualifications required by Section 6 of this Act for appointment to the commission.

(b) The validity of an action of the commission is not affected by the fact that it was taken when a ground for removal of a member of the commission existed.

Vacancies

Sec. 7. Whenever a vacancy in the office of commissioner occurs, it shall be filled in the manner provided herein with respect to the original appointment, except that the governor may make interim appointments to continue until the vacancy can be filled in the manner provided. Any person appointed with the advice and consent of the senate to fill a vacancy shall hold office during the unexpired portion of the term.

Employees

Sec. 8. (a) The commission shall employ such officers, administrative law judges, hearing examiners,

investigators, lawyers, engineers, economists, consultants, statisticians, accountants, administrative assistants, inspectors, clerical staff, and other employees as it deems necessary to carry out the provisions of this Act. All employees receive such compensation as is fixed by the legislature.

(b) The commission shall employ the following:

(1) an executive director,

(2) a director of hearings who has wide experience in utility regulation and rate determination;

(3) a chief engineer who is a registered engineer and an expert in public utility engineering and rate matters;

(4) a chief accountant who is a certified public accountant, experienced in pubic utility accounting;

(5) a director of research who is experienced in the conduct of analyses of industry, economics, energy, fuel, and other related matters that the commission may want to undertake;

(6) a director of consumer affairs and public information; (7) a director of utility evaluation;

(8) a director of energy conservation; and

(9) a general counsel.

(c) The general counsel and his staff are responsible for the gathering of information relating to all matters within the authority of the commission.

The duties of the general counsel include:

(1) accumulation of evidence and other information from public utilities and from the accounting and technical and other staffs of the commission and from other sources for the purposes specified herein;

(2) preparation and presentation of such evidence before the commission or its appointed examiner in proceedings;

(3) conduct of investigations of public utilities under the jurisdiction of the commission;

(4) preparation of proposed changes in the rules of the commission;

(5) preparation of recommendations that the commission undertake investigation of any matter within its authority;

(6) preparation of recommendations and a report of such staff for inclusion in the annual report of the commission;

(7) protection and representation of the public interest and coordination and direction of the preparation and presentation of evidence from the commission staff in all cases before the commission as necessary to effect the objectives and purposes stated iii this Act and ensure protection of the public interest; and

(8) such other activities as are reasonably necessary to enable him to perform his duties.

(d) The commission shall employ administrative law judges to preside at hearings of major importance before the commission. An administrative law judge must be a licensed attorney with not less than five years' general experience or three years' experience in utility regulatory law. The administrative law judge shall perform his duties independently from the commission.

(e) The executive director or his designee shall develop an intraagency career ladder program, one part of which shall be the intraagency posting of all nonentry level positions for at least 10 days before any public posting. The executive director or his designee shall develop a system of annual performance evaluations based on measurable job tasks. All merit pay for commission employees must be based on the system established under this section.

(f) The executive director or his/her designee shall prepare and maintain a written plan to assure implementation of a program of equal employment opportunity whereby all personnel transactions are made without regard to race, color, disability, sex, religion, age, or national origin. The plans shall include:

(1) a comprehensive analysis of all the agency's work force by race, sex, ethnic origin, class of position, and salary

or wage;

(2) plans for recruitment, evaluation, selection, appointment, training, promotion, and other personnel policies;

(3) steps reasonably designed to overcome any identified underutilization of minorities and women in the agency's work force; and

(4) objectives and goals, timetables for the achievement of the objectives and goals, and assignments of responsibility for their achievement.

The plans shall be filed with the governor's office within 60 days of the effective date of this Act, cover an annual period, and be updated at least annually. Progress reports shall be submitted to the governor's office within 30 days of November 1 and April 1 of each year and shall include the steps the agency has taken within the reporting period to comply with these requirements.

Salary

Sec. 9. The annual salary of the commissioners shall be determined by the legislature.

Office; meetings

Sec. 10. The principal office of the commission shall be located in the City of Austin, Texas, and shall be open daily during the usual business hours, Saturdays, Sundays, and legal holidays excepted. The commission shall hold meetings at its office and at such other convenient places in the state as shall be expedient and necessary for the proper performance of its duties.

Seal

Sec. 11. The commission shall have a seal bearing the following inscription: "Public Utility Commission of Texas." The seal shall be affixed to all records and authentications of copies of records and to such other instruments as the

commission shall direct. All courts of this state shall take judicial notice of said seal.

Quorum

Sec. 12. A majority of the commissioners shall constitute a quorum for the transaction of any business, for the performance of any duty, or for the exercise of any power of the commission. No vacancy or disqualification shall prevent the remaining commissioner or commissioners from exercising all the powers of the commission.

Orders; transcript and exhibits; public records

Sec. 13. All orders of the commission shall be in writing and shall contain detailed findings of the facts upon which they are passed. The commission shall retain a copy of the transcript and the exhibits in any matter in which the commission issues an order. All files pertaining to matters which were at any time pending before the commission and to records, reports, and inspections required by Article V hereof shall be public records, subject to the terms of the Texas Open Records Act, Chapter 424, Acts of the 63rd Legislature, Regular Session, 1973, as amended (Article 6252-17a, Vernon's Texas Civil Statutes).

Annual report

Sec. 14. (a) The commission shall publish an annual report to the governor, summarizing its proceedings, listing its receipts and the sources of its receipt.9, listing its expenditures and the nature of such expenditures, and setting forth such other information concerning the operations of the commission and the public utility industry as it considers of general interest.

(b) In the annual report issued in the year preceding the convening of each regular session of the legislature, the commission shall make such suggestions regarding modification and improvement of the commission's statutory authority and

for the improvement of utility regulation in general as it may deem appropriate for protecting and furthering the interest of the public.

Consumer information

Sec. 14A. The commission shall prepare information of consumer interest describing the regulatory functions of the commission and describing the commission's procedures by which consumer complaints are filed with and resolved by the commission. The commission shall make the information available to the general public and appropriate state agencies.

Attorney General to represent commission

Sec. 15. The Attorney General of the State of Texas shall represent the commission in all matters before the state courts, and any court of the United States, and before any federal public utility regulatory commission.

Office of Public Utility Counsel

Sec. 15A. (a) The independent Office of Public Utility Counsel is hereby established to represent the interests of residential and small commercial consumers.

(b) The chief executive of the Office of Public Utility Counsel is the public utility counsel, hereinafter referred to as counsellor. The counsellor is appointed by the governor with the advice and consent of the senate to a two-year term that expires on February 1 of the final year of the term. Immediately after this section takes effect, the governor shall, with the advice and consent of the senate, appoint the public utility counsel.

(c) The counsellor may employ such lawyers, economists, engineers, consultants, statisticians, accountants, clerical staff, and other employees as he or she deems necessary to carry out the provisions of this section. All employees shall receive such compensation as is fixed by the

legislature from the assessment imposed by Section 78 of this Act.

(d) The counsellor shall be a resident of Texas and admitted to the practice of law in this state who has demonstrated a strong commitment and involvement in efforts to safeguard the rights of t.he public and possesses the knowledge and experience necessary to practice effectively in utility proceedings.

(e) During the period of the counsellor's employment and for a period of two years following the termination of employment, it shall be unlawful,for any person employed as counsellor to have a direct or indirect interest in any utility company regulated under the Public Utility Regulatory Act, to provide legal services directly or indirectly to or be employed in any capacity by a utility company regulated under the Public Utility Regulatory Act, its parent, or its subsidiary companies, corporations, or cooperatives; but such person may otherwise engage in the private practice of law after the termination of employment as the counsellor.

(f) The Office of Public Utility Counsel:

(1) shall assess the impact of utility rate changes and other regulatory actions on residential consumers in the State of Texas and shall be an advocate in its own name of positions most advantageous to a substantial number of such consumers as determined by the counsellor;

(2) may appear or intervene as a matter of right as a party or otherwise on behalf of residential consumers, as a class, in all proceedings before the commissions;

(3) may appear or intervene as a matter of right as a party or otherwise on behalf of small commercial consumers, as a class, in all proceedings where it is deemed by the counsel that small commercial consumers are in need of representation.

(4) may initiate or intervene as a matter of right or otherwise appear in any judicial proceedings involving or arising out of any action taken by an administrative agency in

a proceeding in which the counsel was authorized to appear;

(5) may have access as any party, other than staff, to all records gathered by the commission under the authority of Subsection (a) of Section 29 of this Act;

(6) may obtain discovery of any nonprivileged matter which is relevant to the subject matter involved in any proceeding or petition before the commission;

(7) may represent individual residential and small commercial consumers with respect to their disputed complaints concerning utility services unresolved before the commission; and

(8) may recommend legislation to the legislature which in its judgment would positively affect the interests of residential and small commercial consumers.

(g) Nothing in this section shall be construed as in any way limiting the authority of the commission -to represent residential or small commercial consumers.

(h) The appearance of the Public Counsel in any proceeding in no way precludes the appearance of other parties on behalf of residential ratepayers or small commercial consumers. The Public Counsel shall not be grouped with any other parties.

(i) There shall be only one Office of Public Utility Counsel even though that office may be referenced in one or more Acts of the 68th Legislature.

ARTICLE III. JURISDICTION

General power; rules; hearings; statewide and utility electrical energy forecasts; reports; audits

Sec. 16. (a) The commission has the general power to regulate and supervise the business of every public utility within its jurisdiction and to do all things, whether specifically designated in this Act or implied herein, necessary and convenient to the exercise of this power and jurisdiction. The

commission shall make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules governing practice and procedure before the commission. The commission may call and hold hearings, administer oaths, receive evidence at hearings, issue subpoenas to compel the attendance of witnesses and the production of papers and documents, and make findings of fact and decisions with respect to administering the provisions of this Act or the rules, orders, or other actions of the commission.

(b) The commission shall develop a long-term statewide electrical energy forecast which shall be sent to the governor biennially. The forecast will include an assessment of how alternative energy sources, conservation, and load management will meet the state's electricity needs.

(c) Every generating electric utility in the state shall prepare and transmit to the commission by December 31, 1983, and every two years thereafter a report specifying at least a 10-year forecast for assessments of load and resources for its service area. The report shall include a list of facilities which will be required to supply electric power during the forecast periods. The report shall be in a form prescribed by the commission.

The report shall include:

(1) a tabulation of estimated peak load, resources, and reserve margins for each year during the forecast or assessment period;

(2) a list of existing electric generating plants in service with a description of planned and potential generating capacity at existing sites;

(3) a list of facilities which will be needed to serve additional electrical requirements identified in the forecasts or assessments, the general location of such facilities, and the anticipated types of fuel to be utilized in the proposed facilities, including an estimation of shutdown costs and disposal of spent fuel for nuclear power plants;

(4) a description of additional system capacity which might be achieved through, among other things, improvements in (A) generating or transmission efficiency, (B) importation of power, (C) interstate or interregional pooling, (D) other improvements in efficiencies of operation; and (E) conservation measures;

(5) an estimation of the mix and type of fuel resources for the forecast or assessment period;

(6) an annual load duration curve and a forecast of anticipated peak loads for the forecast or assessment period for the residential, commercial, industrial, and such other major demand sectors in the service area of the electric utility as the commission shall determine; and

(7) a description of projected population growth, urban development, industrial expansion, and other growth factors influencing increased demand for electric energy and the basis for such projections.

(d) The commission shall establish and every electric utility shall utilize a reporting methodology for preparation of the forecasts of future load and resources.

(e) The commission shall review and evaluate the electric utilities' forecast of load Ind resources and any public comment on population growth estimates prepared by Bureau of Business Research, University of Texas at Austin.

(f) Within 12 months after the receipt of the reports required in Subsection (b) I of this section, the commission shall hold a public hearing and subsequently issue a final report to the governor and notify every electric utility of the commission's electric forecast for that utility. The commission shall consider its electric forecast in all certification proceedings covering new generation plant.

(g) The commission shall make and enforce rules to encourage the economical production of electric energy by qualifying cogenerators and qualifying small power producers.

(h) The commission shall inquire into the management

of the business of all public utilities under its jurisdiction, shall keep itself informed as to the manner and method in which the management and business is conducted, and shall obtain from any public utility all necessary information to enable the commission to perform management audits. The commission may audit each utility under the jurisdiction of the commission as frequently as needed, but shall audit each utility at least once every 10 years. Six months after any audit the utility shall report to the commission on the status of the implementation of the recommendations of the audit and shall file subsequent reports at such times as the commission deems appropriate.

Jurisdiction of municipality; surrender, original and appellate jurisdiction of commission

Sec. 17. (a) Subject to the limitations imposed in this Act, and for the purpose of regulating rates and services so that such rates may be fair, just, and reasonable, and the services adequate and efficient, the governing body of each municipality shall have exclusive original jurisdiction over all electric, water, and sewer utility rates, operations, and services provided by an electric, water, and sewer utility within its city or town limits.

(b) At any time after two years have passed from the date this Act becomes effective, a municipality may elect to have the commission exercise exclusive original jurisdiction over electric, water, or sewer utility rates, operations, and services within the incorporated limits of the municipality. The governing body of a municipality may by ordinance elect to surrender its original jurisdiction to the commission, or the governing body may submit the question of the surrender to the qualified voters at a municipal election. Upon receipt of a petition signed by the lesser of 20,000 or ten percent of the number of qualified voters voting in the last preceding general election in that municipality, the governing body shall submit the question of the surrender of the municipality's original

jurisdiction to the commission at a municipal election.

(c) A municipality that surrenders its jurisdiction to the commission may at any time, by vote of the electorate, reinstate the jurisdiction of the governing body; provided, however, that any municipality which reinstates its jurisdiction shall be unable to surrender that jurisdiction for five years after the date of the election at which the municipality elected to reinstate its jurisdiction. No municipality may, by vote of the electorate, reinstate the jurisdiction of the governing body during the pendency of any case before the commission involving the municipality.

(d) The commission shall have exclusive appellate jurisdiction to review orders or ordinances of such municipalities as provided in this Act.

(e) The commission shall have exclusive original jurisdiction over electric, water, and sewer utility rates, operations, and services not within the incorporated limits of a municipality exercising exclusive original jurisdiction over those rates, operations, and services as provided in this Act.

Telecommunications utilities; regulation of competition

Sec. 18. (a) It is the policy of this state to protect the public interest in having adequate and efficient telecommunications service available to all citizens of the state at just, fair, and reasonable rates. The legislature finds that the telecommunications industry through technical advancements, federal judicial and administrative actions, and the formulation of new telecommunications enterprises has become and will continue to be in many and growing areas a competitive industry which does not lend itself to traditional public utility regulatory rules, policies, and principles; and that therefore, the public interest requires that new rules, policies, and principles be formulated and applied to protect the public interest and to provide equal opportunity to all telecommunications utilities in a competitive marketplace. It is the purpose of this section to

grant to the commission the authority and the power under this Act to carry out the public policy herein stated.

(b) Subject to the limitations imposed in this Act, and for the purpose of carrying out the public policy above stated and of regulating rates, operations, and services so that such rates may be just, fair, and reasonable, and the services adequate and efficient, the commission shall have exclusive original jurisdiction over the business and property of all telecommunications utilities in this state. In the exercise of its jurisdiction to regulate the rates, operations, and services of a telecommunications utility providing service in a municipality on the state line adjacent to a municipality in an adjoining state, the commission may cooperate with the utility regulatory commission of the adjoining state or the federal government and may hold joint hearings and make joint investigations with any of those commissions.

(c) Except as provided by Section 18A of this Act, the commission shall only have the following jurisdiction over all telecommunications utilities who are not dominant carriers:

(1) to require registration as provided in Subsection (d) of this section;

(2) to conduct such investigations as are necessary to determine the existence, impact, and scope of competition in the telecommunications industry, including identifying dominant carriers and defining the telecommunications market or markets, and in connection therewith may call and hold hearings, issue subpoenas to compel the attendance of witnesses and the production of papers and documents, and make findings of fact and decisions with respect to administering the provisions of this Act or the rules, orders, and other actions of the commission;

(3) to require the filing of such reports as the commission may direct from time to time;

(4) to require the maintenance of statewide average rates or prices of telecommunications service;

(5) to require that every local exchange area have access to interexchange telecommunications service, except that an interexchange telecommunications carrier must be allowed to discontinue service to a local exchange area if comparable service is available in the area and the discontinuance is not contrary to the public interest. This section does not authorize the commission to require an interexchange telecommunications carrier that has not provided services to a local exchange area during the previous 12 months and that has never provided services to that same local exchange area for a cumulative period of one year at any time in the past to initiate services to that local exchange area; and

(6) to require the quality of interexchange telecommunications service provided in each exchange to be adequate to protect the public interest and the interests of customers of that exchange if the commission determines that service to a local exchange has deteriorated to the point that long distance service is not reliable.

(d) All providers of communications service described in Subsection (e) of this section who are providing such service to the public on the effective date of this Act shall register with the commission within 90 days of the effective date of this Act. All providers of communications service described in Subsection (e) of this section who commence such service to the public thereafter shall register with the commission within 30 days of commencing service. Such registration shall be accomplished by filing with the commission a description of the location and type of service provided, the cost to the public of such service, and such other registration information as the commission may direct. Notwithstanding any other provision of this Act, an interexchange telecommunications carrier doing business in this state shall continue to maintain on file with the commission tariffs or lists governing the terms of providing its services.

(e)(1) For the purpose of carrying out the public policy

stated in Subsection (a) of this section and any other section of this Act notwithstanding, the commission is granted all necessary power and authority under this Act to promulgate rules and establish procedures applicable to local exchange companies for determining the level of competition in specific telecommunications markets and submarkets and providing appropriate regulatory treatment to allow local exchange companies to respond to significant competitive challenges. Nothing in this section is intended to change the burden of proof of the local exchange company under Sections 38, 39, 40, and 41 of Article VI of this Act.

(2) In determining the level of competition in a specific market or submarket, the commission shall hold an evidentiary hearing to consider the following:

(A) the number and size of telecommunications utilities or other persons providing the same, equivalent, or substitutable service;

(B) the extent to which the same, equivalent, or substitutable service is available;

(C) the ability of customers to obtain the same, equivalent, or substitutable services at comparable rates, terms, and conditions;

(D) the ability of telecommunications utilities or other persons to make the same, equivalent, or substitutable service readily available at comparable rates, terms, and conditions;

(E) the existence of any significant barrier to the entry or exit of a provider of the service; and

(F) other relevant information deemed appropriate.

(3) The regulatory treatments which the commission may implement include but are not limited to:

(A) approval of a range of rates for a specific service;

(B) approval of customer-specific contracts for a specific service; provided, however, that the commission shall approve a contract to provide central office based PBX-type services for systems of 200 stations or more, billing and collection services,

high-speed private line services of 1.544 megabits or greater, and customized services, provided that the contract is filed at least 30 days before initiation of the service contracted for; that the contract is accompanied with an affidavit from the person or entity contracting for t)ie telecommunications service stating that he considered the acquisition of the same, equivalent, or substitutable services by bid or quotation from a source other than the local exchange company; that the local exchange company is recovering the appropriate costs of providing the services; and that approval of the contract is in the public interest. The contract shall be approved or denied within 30 days after filing, unless the commission for good cause extends the effective date for an additional 35 days; and

(C) the detariffing of rates.

(f) Moreover, in order to encourage the rapid introduction of new or experimental services or promotional rates, the commission shall promulgate rules and establish procedures which allow the expedited introduction of, the establishment and adjustment of rates for, and withdrawal of such services, including requests for such services made to the commission by the governing body of a municipality served by a local exchange company having more than 500,000 access lines throughout the state. Rates established or adjusted at the request of a municipality may not result in higher rates for ratepayers outside the boundaries of the municipality and may not include any rates for local exchange company interexchange services or interexchange carrier access service.

(g) In promulgating new rules and establishing the procedures contemplated in Subsections (e) and (f) of this section, the commission shall seek to balance the public interest in a technologically advanced telecommunications system providing a wide range of new and innovative services with traditional regulatory concerns for preserving universal service, prohibiting anticompetitive practices, and preventing the subsidization of competitive services with revenues from

regulated monopoly services. The commission shall promulgate these rules and establish these procedures so as to incorporate an appropriate mix of regulatory and market mechanisms reflecting the level and nature of competition in the marketplace. Rates established under Subsections (e) and (f) of this section shall not be (1) unreasonably preferential, prejudicial, or discriminatory; (2) subsidized either directly or indirectly by regulated monopoly services; or (3) predatory or anticompetitive.

(h) The commission shall initiate a rulemaking proceeding and take public comment and promulgate rules which prescribe the standards necessary to ensure that all rates set under the provisions of this section cover their appropriate costs as determined by the commission. Until such rules are promulgated, the commission shall use a costing methodology that is in the public interest in determining whether the rates set under the provisions of this section cover their appropriate costs.

(i) The commission is granted all necessary power and authority to prescribe and collect fees and assessments from local exchange companies necessary to recover the commission's and the Office of Public Utility Counsel's costs of activities carried out and services provided under Subsections (e), (f), (g), (h), (i), (j), and (k) of this section.

(j) Subsections (e) and (f) of this section are not applicable to basic local exchange service, including local measured service. Paragraph (B) of Subdivision (3) of Subsection (e) of this section is not applicable to message telecommunications services, switched access services for interexchange carriers, or wide area telecommunications service. A local exchange company may not price similar services provided pursuant to contracts under Paragraph (B) of Subdivision (3) of Subsection (e) of this section in an unreasonably discriminatory manner. For purposes of this section, similar services shall be defined as those services

which are provided at or near the same point in time, which have the same characteristics and which are provided under the same or similar circumstances.

(k) Before January 15 of each odd-numbered year, the commission shall report to the legislature on the scope of competition in regulated telecommunications markets and the impact of competition on customers in both competitive and noncompetitive markets, with a specific focus on rural markets. The report shall include an assessment of the impact of competition on the rates and availability of telecommunications services for residential and business customers and shall specifically address any effects on universal service. The report shall provide a summary of commission actions over the preceding two years which reflect changes in the scope of competition in regulated telecommunications markets. The report shall also include recommendations to the legislature for further legislation which the commission finds appropriate to promote the public interest in the context of a partially competitive telecommunications market.

(l) Notwithstanding any other provision of this Act, the commission may enter such orders as may be necessary to protect the public interest, including the imposition on any specific service or services of its full regulatory authority under Articles III through XI of this Act, if the commission finds upon notice and hearing that an interexchange telecommunications carrier has engaged in conduct that demonstrates the ability to control prices in a manner adverse to the public interest.

(m) Notwithstanding any other provision of this Act, the commission may enter such orders as may be necessary to protect the public interest if the commission finds upon notice and hearing that an interexchange telecommunications carrier has:

(1) failed to maintain statewide average rates;

(2) abandoned interexchange message telecom-

munications service to a local exchange area in a manner contrary to the public interest; or

(3) engaged in a pattern of preferential or discriminatory activities prohibited by Sections 45 and 47 of this Act, except that nothing in this Act shall prohibit volume discounts or other discounts based on reasonable business purposes.

(n) In any proceeding before the commission alleging conduct or activities by an interexchange telecommunications carrier against another interexchange carrier in contravention of Subsections (1), (m), and (o) of this section, the burden of proof shall be upon the complaining interexchange telecommunications carrier; however, in such proceedings brought by customers or their representatives who are not themselves interexchange telecommunications carriers or in such proceedings initiated by the commission's general counsel, the burden of proof shall be upon the respondent interexchange telecommunications carrier. However, if the commission finds it to be in the public interest, the commission may impose the burden of proof in such proceedings on the complaining party.

(o) The commission shall have the authority to require that a service provided by an interexchange telecommunications carrier described iii Subsection (e) of this section be made available in an exchange served by the carrier within a reasonable tune after receipt of a bona fide request for such service in that exchange, subject to the ability of the local exchange carrier to provide the required access or other service. No carrier shall be required to extend a service to an area if provision of that service would impose, after consideration of the public interest to be served, unreasonable costs upon or require unreasonable investments by the interexchange telecommunications carrier. The commission may require such information from interexchange carriers and local exchange carriers as may be necessary to enforce this provision.

(p) Before January 15 of each odd-numbered year, the

commission shall report to the legislature on the scope of competition in regulated telecommunications markets and the impact of competition on customers in both competitive and noncompetitive markets, with a specific focus on rural markets. The report shall include an assessment of the impact of competition on the rates and availability of telecommunications services for residential and business customers and shall specifically address any effects on universal service. The report shall provide a summary of commission actions over the preceding two years that reflect changes in the scope of competition in regulated telecommunications markets. The report shall also include recommendations to the legislature for further legislation that the commission finds appropriate to promote the public interest in the context of a partially competitive telecommunications market.

(q) The commission may exempt from any requirement of this section an interexchange telecommunications carrier that the commission determines does not have a significant effect on the public interest, and it may exempt any interexchange carrier which solely relies on the facilities of others to complete long distance calls if the commission deems this action to be in the public interest.

(r) Requirements imposed by Subsections (c), (d), (1), (m), (n), (o), (p), and (q) of this section on an interexchange telecommunications carrier shall apply to nondominant carriers and shall constitute the minimum requirements to be imposed by the commission for any dominant carrier.

Operator service; regulation and disclosure of Information

Sec. 18A. (a) In this section "operator service" means any service using live operator or automated operator functions for the handling of telephone service such as toll calling via collect, third number billing, and calling card services. Calls for which the called party has arranged to be billed (800 service) shall not be considered operator services. (b) Prior to

the connection of each call the operator service provider shall:

(1) announce the provider's name; and

(2) quote, at the caller's request, the rate and any other fees or surcharges applicable to the call and charged by the provider.

(c) An operator service provider shall furnish each entity with which it contracts to provide operator service a sticker, card, or other form of information approved by the commission for each telephone that has access to the service and is intended to be utilized by the public, unless the owner of the telephone has received approval from the commission for an alternative form of information. The information must state the provider's name, that tile operator service provider will provide rate information on the caller's request, that the caller will be informed how to access the local exchange carrier operator on request, and that any complaint about the service may be made to the provider or the commission at the designated telephone number. The operator service provider shall require by contract that the entity receiving the information display it on or near each of the telephones that has access to the service and is intended for use by the public.

(d) An operator service provider must, on request, inform the caller how to access the operator for the local exchange carrier serving the exchange from which the call is made. No charge shall be made for this information.

(e) The commission shall adopt rules requiring an operator service provider to include in its contract with each entity through which it provides operator service a requirement that the telephones subscribed to its services shall allow access to the local exchange carrier operator serving the exchange from which the call is made and to other telecommunications utilities; but in order to prevent fraudulent use of its services, an operator service provider and individual entities through which it provides operator services may block access if either obtains a waiver for this purpose from the commission or the

Federal Communications Commission. The procedure and criteria for obtaining i waiver from the commission shall be set forth in the commission's rules.

(f) The commission shall promulgate rules consistent with the requirements of this section and any additional requirements deemed necessary to protect the public interest by January 1, 1990. All rules promulgated under this section shall be nondiscriminatory and designed to promote competition that facilitates consumer choice.

(g) The commission may investigate a complaint that it receives concerning operator services. If the commission determines that an operator service provider has violated or is about to violate this section, the commission may, upon proper notice and evidentiary hearing, take action to stop, correct, or prevent the violation.

(h) This section applies only to a telecommunications utility that is not a dominant carrier. The commission is granted all necessary power and authority under this Act to promulgate rules and establish procedures for the purposes of enforcing and implementing this section.

Sec. 19. Repealed by Acts 1983, 68th Leg., p. 1222, eh. 263, § 25, eff. Sept. 1, 1983.

Municipally owned utilities

Sec. 20. Nothing in this article shall be construed to confer on the commission power or jurisdiction to regulate or supervise the rates or service of any utility owned and operated by any municipality within its boundaries either directly or through a municipally owned corporation, or to affect or limit the power, jurisdiction, or duties of the municipalities that have elected to regulate and supervise public utilities within their boundaries, except as provided in this Act.

ARTICLE IV. MUNICIPALITIES

Franchises

Sec. 21. Nothing in this Act shall be construed as in any way limiting the rights and powers of a municipality to grant or refuse franchises to use the streets and alleys within its limits and to make the statutory charges for the use thereof, but no provision of any franchise agreement shall limit or interfere with any power conferred on the commission by this Act. If a municipality performs regulatory functions under this Act, it may make such other charges as may be provided in the applicable franchise agreement, together with any other charges permitted by this Act.

Local utility service; exempt and nonexempt areas

Sec. 22. Notwithstanding any other provision of this section, municipalities shall continue to regulate each kind of local utility service inside their boundaries until tile commission has assumed jurisdiction over the respective utility pursuant to this Act. If a municipality does not surrender its jurisdiction, local utility service within the boundaries of the municipality shall be exempt from regulation by the commission under the provisions of this Act to the extent that this Act applies to local service, and the municipality shall have, regarding service within its boundaries, the right to exercise the same regulatory powers under the same standards and rules as the commission, or other standards and rules not inconsistent therewith. Notwithstanding any such election, the commission may consider a public utility's revenues and return on investment in exempt areas in fixing rates and charges in nonexempt areas, and may also exercise the powers conferred necessary to give effect to orders under this Act, for the benefit of nonexempt areas. Likewise, in fixing rates and charges in the exempt area, the governing body may consider a public utility's revenues and return on investment in nonexempt areas.

Utilities serving exempt areas shall be subject to the reporting requirements of this Act. Such reports shall be filed with the governing body of the municipality as well as with the commission. Nothing in this section shall limit the duty and power of the commission to regulate service and rates of municipally regulated utilities for service provided to other areas in Texas.

Rate determination

Sec. 23. Any municipality regulating its public utilities pursuant to this Act shall require from those utilities all necessary data to make a reasonable determination of rate base, expenses, investment, and rate of return within the municipal boundaries. The standards for such determination shall be based on the procedures and requirements of this Act and said municipality shall retain any and all personnel necessary to make the determination of reasonable rates required under this Act.

Ratemaking proceedings; engagement of consultants, accountants, auditors, attorneys and engineers; standing

Sec. 24. (a) The governing body of any municipality participating in or conducting ratemaking proceedings shall have the right to select and engage rate consultants, accountants, auditors, attorneys, engineers, or any combination thereof, to conduct investigations, present evidence, advise and represent the governing body, and assist with litigation in public utility ratemaking proceedings before the governing body, ally regulatory authority, or in court. The public utility engaged in such proceedings shall be required to reimburse the governing body for the reasonable costs of such services to the extent found reasonable by the applicable regulatory authority.

(b) Municipalities shall have standing in all cases before the commission regarding utilities serving within their corporate limits subject to the right of the commission to determine

standing in cases involving retail service area disputes involving two or more utilities and to consolidate municipalities on issues of common interest and shall be entitled to judicial review of orders regarding said proceedings in accordance with Section 69 of the Act.

Assistance of commission

Sec. 25. The commission may advise and assist municipalities upon request in connection with questions and proceedings arising under this Act. Such assistance may include aid to municipalities in connection with matters pending before the commission or the courts, or before the governing body of any municipality, including making members of the staff available as witnesses and otherwise providing evidence to them.

Appeal

Sec. 26. (a) Any party to a rate proceeding before the governing body of a municipality may appeal the decision of the governing body to the commission.

(b) Citizens of a municipality may appeal the decision of the governing body in any rate proceeding to the commission through the filing of a petition for review signed by the lesser of 20,000 or 10 percent of the number of qualified voters of such municipality.

Text of subsec. (c) as amended by Acts 1989, 71st Leg., ch. 325, § 1

(c) Ratepayers of a municipally owned electric utility outside the municipal limits may appeal any action of the governing body affecting the rates of the municipally owned electric utility through filing with the commission petition for review signed by tile lesser of 10,000 or 5 percent of the ratepayers served by such utility outside the municipal limits. For purposes of this subsection each person receiving a

separate bill shall be considered as a ratepayer. But no person shall be considered as being more than one ratepayer notwithstanding the number of bills received. Such petition for review shall be considered properly signed if signed by any person, or spouse of any such person, in whose name residential utility service is carried. Not later than the 90th day after the date on which a petition for review that meets the requirements of this subsection is filed, the municipality shall file with the commission a rate application that complies in all material respects with the rules and forms prescribed by the commission. The commission may, for good cause shown, extend the time period for filing the rate application.

Text of subsec. (c) as amended by Acts 1989, 71st Leg., ch. 1167, § 1

(c)(1) Ratepayers of a municipally owned electric utility outside the municipal limits may appeal any action of the governing body affecting the rates of the municipally owned electric utility through filing with the commission a petition for review signed by the lesser of 10,000 or 5 percent of the ratepayers served by such utility outside the municipal limits. For purposes of this subsection each person receiving a separate bill shall be considered as a ratepayer. But no person shall be considered as being more than one ratepayer notwithstanding the number of bills received. Such petition for review shall be considered properly signed if signed by any person, or spouse of any such person, in whose name residential utility service is carried. The municipality that owns the electric utility shall on request disclose to any person the number of ratepayers who reside outside the municipal limits. The municipality shall provide the information by telephone or in a written form, as preferred by the person making the request. The municipality may not charge a fee for providing the information. The municipality shall on request provide to any person a list of the names and addresses of the ratepayers

who reside outside the municipal limits. The municipality may charge a reasonable fee to cover the cost of providing the list.

(2) Not later than the 14th day after the date on which the governing body makes a final decision, the municipality shall issue a written report stating the effect of the decision on each class of ratepayers. The appeal process shall be instituted by filing a petition for review with the commission and serving copies on all parties to the original rate proceeding. The petition must be filed not later than the 45th day after the date on which the municipality issues the written report prescribed by this subsection.

(d) Any municipally owned electric utility whose rates have been or are appealed under Subsection (c) of this section, and for which the commission has ordered or orders a decrease in annual nonfuel base revenues which exceeds the greater of $25,000,000 or 10 percent of the utility's nonfuel base revenues, as calculated on a total system basis (without regard to the municipal utility's corporate boundaries) and established in the rate ordinance or ordinances appealed from, and for which the commission has found or finds that the rates paid by the combined residential or any other major customer class (other than any class or classes where the city is itself the customer of the municipally owned utility) are removed from cost of service levels to the extent that, under the nonfuel base revenue requirement adopted by the commission (as computed on a total system basis without regard to the municipality's corporate boundaries), a change in nonfuel base rate revenues in excess of 507, from adjusted test year levels would be required to move that class to a relative rate of return of unity (1.00 or 100%,) under the cost of service methodology adopted by the commission in an appeal under Subsection (e) of this section, shall thereafter be subject to the following:

(1) For a period of 10 years beginning on the later of the effective date of this subsection, or the effective date of the rate ordinance which was the subject of the commission's final

order invoking the application of this subsection, the commission shall have appellate jurisdiction over the rates charged by the municipally owned utility, both inside and outside such municipality's corporate limit. in the same manner and subject to the same commission powers and authority as set forth in this Act for public utilities, but specifically limited as follows:

(A) The commission shall have the jurisdiction to review the cost allocation and rate design methodologies adopted by the City Council or other governing body of the municipally owned utility subject to this subsection.

(i) If the commission finds that such cost of service methodologies result in rates which are unjust, unreasonable, or unreasonably discriminatory or unduly preferential to any customer class, then the commission may order the implementation of ratesetting methodologies which the commission finds reasonable.

(ii) The commission shall ensure that no customer class, other than any class or classes where the city is itself the customer of the municipally owned utility, pays rates which result in a relative rate of return exceeding 115 percent under the cost-of-service methodology found reasonable by the commission, provided that no customer class experience a percentage base rate increase that is greater than 11/2 times the system average base increase. In moving above-cost classes toward cost-of-service levels, those classes farthest above cost shall be moved sequentially toward cost, such that no above-cost class moves toward cost until no other class or classes are further removed from cost.

(iii) The municipality may, as a matter of intra-class rate design, design residential rates to accomplish reasonable energy conservation goals, notwithstanding any other provision of this Act.

(B) The commission's jurisdiction under this subsection may be invoked by any party to the local rate proceedings

required by this subsection, in the same manner as appeals of the rates of public utilities under Subsection (a) of this section. Provided, however, that the commission's jurisdiction under this subsection shall not extend to the municipally owned utility's revenue requirements, whether base rate or fuel revenues, its invested capital, its return on invested capital, its debt service coverage ratio, or the level of any transfer of revenues from the utility to the municipality's general fund.

(2) The City Council or other governing board of a municipally owned utility subject to this subsection shall establish procedures similar to those procedures employed by municipalities which have retained original jurisdiction under Section 17(a) of this Act to regulate public utilities operating within such municipalities' corporate boundaries. Such procedures shall include a public hearing process in which affected ratepayers are granted party status on request and are grouped for purposes of participation in accordance with their common or divergent interests, including but not limited to tile particular interests of all-electric and out-of-city residential ratepayers. Provided, however, that nothing in this Act or this subsection shall require the City Council or governing board of the municipally owned utility to which this subsection applies to employ or establish procedures that require the use of the Texas Rules of Evidence, the Texas Rules of Civil Procedure, or the presentation of sworn testimony or other forms of sworn evidence. The City Council or other governing board shall appoint a consumer advocate to represent the interests of residential and small commercial ratepayers in the municipality's local rate proceedings. The consumer advocate's reasonable costs of participation in said proceedings, including the reasonable costs of ratemaking consultants and expert witnesses, shall be funded by and recovered from such residential and small commercial ratepayers.

(3) The Public Utility Commission shall establish rules applicable to any party to an appeal under Subsection (e) of this

section that provide for the public disclosure of financial and in-kind contributions and expenditures related to preparation of and filing of a petition for appeal and in preparation of expert testimony or legal representation for an appeal. Any party or customer who is a member of a party who makes a financial contribution or in-kind contribution to assist in an appeal of another party or customer class under Subsection (e) of this section shall, upon a finding of tile commission to that effect, be required to pay the municipally owned utility a penalty equivalent in amount to two times the contribution. Nothing in this subsection shall be construed to limit the right of any party or customer to expend funds to represent its own interests following the filing of a petition with the Public Utility Commission under Subsection (e) of this section.

(e) Any municipally owned electric utility whose rates have been or are appealed under Subsection (e) of this section, and for which the commission has ordered or orders a decrease in annual nonfuel base revenues which exceeds the greater of $25,000,000 or 10 percent of the utility's nonfuel base revenues, as calculated on a total system basis (without regard to the municipal utility's corporate boundaries) aid established in the rate ordinance or ordinances appealed from, and for which the commission has found or finds that the rates paid by the combined residential or any other major customer class (other than any class or classes where the city is itself the customer of the municipally owned utility) are removed from cost of service levels to the extent that, under tile nonfuel base revenue requirement adopted by the commission (as computed on a total system basis without regard to the municipality's corporate boundaries), a change in nonfuel base rate revenues in excess of 507, from adjusted test year levels would be required to move that class to a relative rate of return of unity (1.00 or 100%) under the cost of service methodology adopted by the commission in an appeal under Subsection (e) of this section, shall thereafter be subject to the following:

(1) For a period of 10 years beginning on the later of the effective date of this subsection, or the effective date of the rate ordinance which was the subject of the commission's final order invoking the application of this subsection, the commission shall have appellate jurisdiction over the rates charged by the municipally owned utility, outside the municipality's corporate limits, in the manner and to the extent provided in this subsection.

(2) Ratepayers of a municipally owned utility subject to this subsection who reside outside the municipality's corporate limits may appeal any action of the governing body affecting the rates charged by the municipally owned electric utility outside the corporate limits through filing with the commission a petition for review in accordance with the same procedures, requirements, and standards applicable to appeals brought under Subsection (e) of this section, except as otherwise specifically provided in this subsection. The petition for review must plainly disclose that the cost of bringing and pursuing the appeal will be funded by a surcharge on the monthly electric bills of outside-city ratepayers in a manner prescribed by the commission.

(A) Upon commission approval of the sufficiency of a petition, the appellants shall submit for the approval of the Office of Public Utility Counsel a budget itemizing the scope and expected cost of consultant services to be purchased by the appellants in connection with the appeal.

(B) After a final order has been entered by the commission in the appeal, the consultant and legal costs approved by public counsel as reasonable shall be assessed by the municipality on a per capita basis among residential ratepayers who reside outside the municipality. Surcharges shall be assessed in a one-time charge not later than 120 days following entry of the commission's final order. Costs incurred by the appellants shall be reimbursed by the municipality within not later than 90 days following the date

the commission enters its final order.

(C) The municipality shall not include the costs associated with its defense of an appeal under this subsection in the rates of outside-city ratepayers. Nor shall the municipality, if it appeals from an order entered by the commission under this subsection, include the costs associated with its appeal in the rates of ratepayers who reside outside t)ie city.

(D) Ratepayers who appeal under this subsection may not receive funding for rate case expenses except from residential ratepayers who reside outside the municipality's boundaries or from other municipalities inside whose corporate limits the municipally owned utility provides service. The commission shall adopt rules for the reporting of financial and in-kind contributions in support of appeals brought under this subsection. Upon a finding by the commission that an appellant has received contributions from any source other than outside-city ratepayers or such other municipalities, the appeal and orders of the commission entered therein shall be null and void.

(3) In appeals under this subsection, the commission shall have jurisdiction Ind authority to review and ensure that the revenue requirements of any municipally owned utility subject to this subsection are reasonable, but such jurisdiction and authority does not extend to regulation of the use and level of any transfer of the utility's revenues to the municipality's general fund. The commission shall also have jurisdiction and authority to review the cost allocation and rate design methodologies adopted by the governing body of the municipally owned utility. If the commission finds that such cost of service methodologies result in rates which are unjust, unreasonable, or unreasonably discriminatory or unduly preferential to any customer class, then the commission may order the implementation of ratesetting methodologies which the commission finds reasonable; provided, however, that the

commission's jurisdiction under this subsection shall not encompass matters of intra-class residential rate design.

(4) An intervenor in an appeal brought under this subsection shall be limited to presenting testimony and evidence on cost allocation and i,ate design methodologies, except that intervenors may present evidence and testimony in support of the municipality on issues related to utility revenues.

(5) An appellant ratepayer residing outside the corporate limits of a municipally owned utility subject to this subsection shall, in appealing from a rate ordinance or other ratesetting action of the municipality's governing board, elect to petition for review under either Subsection (e) of this section or this subsection.

(f) The appeal process shall be instituted within 30 days of the final decision by the governing body with the filing of a petition for review with the commission and copies served on all parties to the original rate proceeding.

(g) The commission shall hear such appeal de novo based on the test year presented to the municipality and by its final order shall fix such rates as the municipality should have fixed in the ordinance from which the appeal was taken. In the event that the commission fails to enter its final order: (1) for proceedings involving the rates of a municipally owned utility, within 185 days from the date on which the appeal is perfected or on which the utility files a rate application as prescribed I)y Subsection (e) of this section; or (2) for proceedings in which similar relief has also been concurrently sought from the commission under its original jurisdiction, within 120 days from the date such appeal is perfected or the date upon which final action must be taken in the similar proceedings so filed with the commission whichever shall last occur; or (3) in all other proceedings, within 185 days from the date such appeal is perfected, the schedule of rates proposed by the utility shall be deemed to have been approved by the commission and effective upon the expiration of said applicable period. Any

rates, whether temporary or permanent, set by the commission shall be prospective and observed from and after the applicable order of the commission, except interim rate orders necessary to effect uniform system-wide rates.

ARTICLE V. RECORDS, REPORTS, INSPECTIONS, RATES AND SERVICES

Records of public utility; rates, methods and accounts

Sec. 27. (a) Every public utility shall keep and render to the regulatory authority in the manner and form prescribed by the commission uniform accounts of all business transacted. The commission may also prescribe forms of books, accounts, records, and memoranda to be kept by such public utilities, including the books, accounts, records, and memoranda of the rendition of and capacity for service as well as the receipts and expenditures of moneys, and any other forms, records, and memoranda which in the judgment of the commission may be necessary to carry out any of the provisions of this Act. In the case of any public utility subject to regulations by a federal regulatory agency, compliance with the system of accounts prescribed for the particular class of utilities by such agency may be deemed a sufficient compliance with the system prescribed by the commission; provided, however, that the commission may prescribe forms of books, accounts, records, and memoranda covering information in addition to that required by the federal agency. The system of accounts and the forms of books, accounts, records, and memoranda prescribed by the commission for a public utility or class of utilities shall not conflict nor be inconsistent with the systems and forms established by a federal agency for that public utility or class of utilities.

(b) The commission shall fix proper and adequate rates and methods of depreciation, amortization, or depletion of the several classes of property of each public utility, and shall

require every public utility to carry a proper and adequate depreciation account in accordance with such rates and methods and with such other rules and regulations as the commission prescribes. Such rates, methods, and accounts shall be utilized uniformly and consistently throughout the ratesetting and appeal proceedings.

(c) Every public utility shall keep separate accounts to show all profits or losses resulting from the sale or lease of appliances, fixtures, equipment, or other merchandise. No such profit or loss shall be taken into consideration by the regulatory authority in arriving at any rate to be charged for service by any such public utility, to the extent that such merchandise is not integral to the provision of utility service.

(d) Every public utility is required to keep and render its books, accounts, records, and memoranda accurately and faithfully in the manner and form prescribed by the commission, and to comply with all directions of the regulatory authority relating to such books, accounts, records, and memoranda. The regulatory authority may require the examination and audit of all accounts.

(e) In determining the allocation of tax savings derived from application of such methods as liberalized depreciation and amortization and the investment tax credit, the regulatory authority shall equitably balance the interests of present and future customers and shall apportion such benefits between consumers and the public utilities accordingly. Where any portion of the investment tax credit has been retained by a public utility, that same amount shall be deducted from the original cost of the facilities or other addition to the rate base to which the credit applied, to the extent allowed by the Internal Revenue Code.

(f) For the purposes of this section, "public utility" includes "municipally owned utility."

Powers of commission

Sec. 28. (a) The commission shall have the power to:

(1) require that public utilities report to it such information relating to themselves and affiliated interests both within and without the State of Texas as it may consider useful in the administration of this Act;

(2) establish forms for all reports;

(3) determine the time for reports and the frequency with which any reports are to be made;

(4) require that any reports be made under oath;

(5) require that a copy of any contract or arrangement between any public utility and any affiliated interest be filed with it. It may require any such contract or arrangement not in writing to be reduced to writing and filed with it;

(6) require that a copy of any report filed with any federal agency or any governmental agency or body of any other state be filed with it;

(7) require that a copy of annual reports showing all payments of compensation (other than salary or wages subject to the withholding of federal income tax) to residents of Texas, or with respect to legal, administrative, or legislative matters in Texas, or for representation before the Texas Legislature or any governmental agency or body; and

(8) the railroad commission shall have the power to review and approve, for purposes of the Outer Continental Shelf Lands Act Amendments of 19781 and any other federal authorities, applications by gas utilities for the purchase of natural gas from producing affiliates.

(b) On the request of the governing body of any municipality, the commission may provide sufficient staff members to advise and consult with such municipality on any pending matter.

Inspections; examination under oath; compelling production of records; inquiry into management and affairs

Sec. 29. (a) Any regulatory authority, and when authorized by the regulatory authority, its counsel, agents, and employees, shall have the right, at reasonable times and for reasonable purposes, to inspect and obtain copies of the papers, books, accounts, documents, and other business records, and to inspect the plant, equipment, and other property of any public utility within its jurisdiction. The regulatory authority may examine under oath, or it may authorize the person conducting such investigation to examine under oath, any officer, agent, or employee of any public utility in connection with such investigation. The regulatory authority may require, by order or subpoena served on any public utility, the production within this state at the time and place it may designate, of any books, accounts, papers, or records kept by that public utility outside the state, or verified copies in lieu thereof if the commission so orders. Any public utility failing or refusing to comply with any such order or subpoena is in violation of this Act.

(b)(1) A member, agent, or employee of the regulatory authority may enter the premises occupied by a public utility to make inspections, examinations, and tests and to exercise any authority provided by this Act.

(2) A member, agent, or employee of the regulatory authority may act under this section only during reasonable hours and after giving reasonable notice to the utility.

(3) The public utility is entitled to be represented when inspections, examinations, and tests are made on its premises. Reasonable time for the utility to secure a representative shall be allowed before commencing an inspection, examination, or test.

(c) The regulatory authority may inquire into the management and affairs of all public utilities, and shall keep

itself informed as to the manner and method in which the same are conducted.

Reporting of advertising or public relations expenses

Sec. 30. The regulatory authority may require an annual reporting from each utility company of all its expenditures for business gifts and entertainment, and institutional, consumption-inducing and other advertising or public relations expenses. The regulatory authority shall not allow as costs or expenses for rate-making purposes any of these expenditures which the regulatory authority determines not to be in the public interest. The cost of legislative-advocacy expenses shall not in any case be allowed as costs or expenses for rate-making purposes. Reasonable charitable or civic contributions may be allowed not to exceed the amount approved by the regulatory authority.

Unlawful rates, rules and regulations

Sec. 31. It shall be unlawful for any utility to charge, collect, or receive any rate for public utility service or to impose any rule or regulation other than as herein provided.

Filing schedule of rates, rules and regulations

Sec. 32. Every public utility shall file with each regulatory authority schedules showing all rates which are subject to the original or appellate jurisdiction of the regulatory authority and which are in force at the time for any public utility service, product, or commodity offered by the utility. Every public utility shall file with, and as a part of such schedules, all rules and regulations relating to or affecting the rates, public utility service, product, or commodity furnished by such utility.

Office of public utility; records; removal from state

Sec. 33. Every public utility shall have an office in a

county of this state in which its property or some part thereof is located in which it shall keep all books, accounts, records, and memoranda required by the commission to be kept in the state. No books, accounts, records, or memoranda required by the regulatory authority to be kept in the state shall be removed from the state, except on conditions prescribed by the commission.

Communications by public utilities with regulatory authority; regulations and records

Sec. 34. (a) The regulatory authority shall prescribe regulations governing communications by public utilities, their affiliates and their representatives, with the regulatory authority or any member or employee of the regulatory authority.

(b) Such records shall contain the name of the person contacting the regulatory authority or member or employee of the regulatory authority, the name of the business entities represented, a brief description of the subject matter of the communication, and the action, if any, requested by the public utility, affiliate, or representative. These records shall be available to the public on a monthly basis.

Standards of service

Sec. 35. (a) Every public utility shall furnish such service, instrumentalities, and facilities as shall be safe, adequate, efficient, and reasonable.

(b) The regulatory authority after reasonable notice and hearing had on its own motion or on complaint, may ascertain and fix just and reasonable standards, classifications, regulations, or practices to be observed and followed by any or all public utilities with respect to the service to be furnished; ascertain and fix adequate and reasonable standards for the measurement of the quantity, quality, pressure, initial voltage, or other condition pertaining to the supply of the service; prescribe reasonable regulations for the examination and testing

of the service and for the measurement thereof; and establish or approve reasonable rules, regulations, specifications, and standards to secure the accuracy of all meters, instruments and equipment used for the measurement of any service of any public utility. Any standards, classifications, regulations, or practices now or hereafter observed or followed by any public utility may be filed by it with the regulatory authority, and the same shall continue in force until amended by the public utility or until changed by the regulatory authority as herein provided.

(c) Notwithstanding any other provision of law, all lines owned by a public utility for the transmission and/or distribution of electric energy shall be constructed, operated, and maintained, as to clearances, in accordance with the National Electrical Safety Code Standard ANSI (c)(2), as adopted by the American National Safety Institute Ind in effect at the time of construction.

Examination and test of equipment

Sec. 36. (a) The regulatory authority may examine and test any meter, instrument, or equipment used for the measurement of any service of any public utility and may enter any premises occupied by any public utility for the purpose of making such examinations and tests and exercising any power provided for in this Act and may set up and use on such premises any apparatus and appliances necessary therefor. The public utility shall have the right to be represented at the making of the examinations, tests, and inspections. The public utility and its officers and employees shall facilitate the examinations, tests, and inspections by giving every reasonable aid to the regulatory authority and any person or persons designated by the regulatory authority for the duties aforesaid.

(b) Any consumer or user may have any meter or measuring device tested by the utility once without charge, after a reasonable period to be fixed by the regulatory authority by rule, and at shorter intervals on payment of reasonable fees

fixed by the regulatory authority. The regulatory authority shall declare and establish reasonable fees to be paid for other examining and testing such meters and other measuring devices on the request of the consumer. If the test is requested to be made within the period of presumed accuracy as fixed by the regulatory authority since the last such test of the same meter or other measuring device, the fee to be paid by the consumer or user at the time of his request shall be refunded to the consumer or user if the meter or measuring device is found unreasonably defective or incorrect to the substantial disadvantage of the consumer or user. If the consumer's request is made at a time beyond the period of presumed accuracy fixed by the regulatory authority since the last such test of the same meter or measuring device, the utility shall make the test without charge to the consumer or user.

ARTICLE VI. PROCEEDINGS BEFORE THE REGULATORY AUTHORITY

Power to insure compliance; rate regulation

Sec. 37. Subject to the provisions of this Act, the commission is hereby vested with all authority and power of the State of Texas to insure compliance with the obligations of public utilities in this Act. For this purpose the regulatory authority is empowered to fix and regulate rates of public utilities, including rules and regulations for determining the classification of customers and services and for determining the applicability of rates. No rule or order of the regulatory authority shall be iii conflict with the rulings of any federal regulatory body.

Just and reasonable rates

Sec. 38. It shall be the duty of the regulatory authority to insure that every rate made, demanded, or received by any public utility, or by any two or more public utilities jointly,

shall be just and reasonable. Rates shall not be unreasonably preferential, prejudicial, or discriminatory, but shall be sufficient, equitable, and consistent in application to each class of consumers. For ratemaking purposes, the commission may treat two or more municipalities served by a public utility as a single class wherever it deems such treatment to be appropriate. Approval by the commission of a reduced rate for service for a class of consumers eligible under Section 95 of this Act for tel-assistance service does not constitute a violation of this section.

Fixing overall revenues

Sec. 39. (a) In fixing the rates of a public utility the regulatory authority shall fix its overall revenues at a level which will permit such utility a reasonable opportunity to earn a reasonable return on its invested capital used and useful in rendering service to the public over and above its reasonable and necessary operating expenses.

(b) In fixing a reasonable return on invested capital, the regulatory authority shall consider, in addition to other applicable factors, efforts to comply with the statewide energy plan, the efforts and achievements of such utility in the conservation of resources, the quality of the utility's services, the efficiency of the utility's operations, and the quality of the utility's management.

Burden of proof

Sec. 40. Except as hereafter provided, in any proceeding involving any proposed change of rates, the burden of proof to show that the proposed change, if proposed by the utility, or that the existing rate, if it is proposed to reduce the rate, is just and reasonable shall be on the public utility. In any proceeding involving a local exchange company in which the local exchange company's rate or rates are in issue, the burden of proof that such rate or rates are just and reasonable

shall be on the local exchange company.

Components of invested capital and net income

Sec. 41. The components of invested capital and net income shall be determined according to the following rules:

(a) Invested Capital. Utility rates shall be based upon the original cost of property used by and useful to the public utility in providing service including construction work in progress at cost as recorded on the books of the utility. The inclusion of construction work in progress is an exceptional form of rate relief to be granted only upon the demonstration by the utility that such inclusion is necessary to the financial integrity of the utility. Construction work in progress shall not be included in the rate base for major projects under construction to the extent that such projects have been inefficiently or imprudently planned or managed. Original cost shall be the actual money cost, or the actual money value of any consideration paid other than money, of the property at the time it shall have been dedicated to public use, whether by the utility which is the present owner or by a predecessor, less depreciation.

(b) Separations and Allocations. Costs of facilities, revenues, expenses, taxes, and reserves shall be separated or allocated as prescribed by the regulatory authority.

(c) Net Income. By "net income" is meant the total revenues of the public utility less all reasonable and necessary expenses as determined by the regulatory authority. The regulatory authority shall determine expenses and revenues in a manner consistent with the following:

(1) Transactions with Affiliated Interests. Payment to affiliated interests for costs of any services, or any property, right or thing, or for interest expense shall not be allowed either as capital cost or as expense except to the extent that the regulatory authority shall find such payment to be reasonable and necessary for each item or class of items as determined by

the commission. Any such finding shall include specific findings of the reasonableness and necessity of each item or class of items allowed and a finding that the price to the utility is no higher than prices charged by the supplying affiliate to its other affiliates or division for the same item or class of items, or to unaffiliated persons or corporations. The price paid by gas utilities to affiliated interests for natural gas from Outer Continental Shelf lands shall be subject to a rebuttable presumption that such price is reasonable if the price paid does not exceed the price permitted by federal regulation if such gas is regulated by any federal agency or if not regulated by a federal agency does not exceed the price paid by nonaffiliated parties for natural gas from Outer Continental Shelf lands. The burden of establishing that such a price paid is not reasonable shall be on any party challenging the reasonableness of such price.

(2) Income Taxes. If the public utility is a member of an affiliated group that is eligible to file a consolidated income tax return, and if it is advantageous to tile public utility to do.so, income taxes shall be computed as though a consolidated return had been so filed and the utility had realized its fair share of the savings resulting from the consolidated return, unless it is shown to the satisfaction of the regulatory authority that it was reasonable to choose not to consolidate returns. The amounts of income taxes saved by a consolidated group of which a public utility is a member by reason of the elimination in the consolidated return of the intercompany profit on purchases by the public utility from an affiliate shall be applied to reduce the cost of the property or services so purchased. The investment tax credit allowed against federal income taxes, to the extent retained by the utility, shall be applied as a reduction in the rate based contribution of the assets to which such credit applies, to the extent and at such rate as allowed by the Internal Revenue Code.

(3) Expenses Disallowed. The regulatory, authority

shall not consider for ratemaking purposes the following expenses:

(A) legislative advocacy expenses, whether made directly or indirectly, including but not limited to legislative advocacy expenses included in trade association dues;

(B) payments, except those made under an insurance or risk-sharing arrangement executed before the date of loss, made to cover costs of an accident, equipment failure, or negligence at a utility facility owned by a person or governmental body not selling power inside the State of Texas;

(C) Costs of processing a refund or credit under Subsection (e) of Section 43 of this Act; or

(D) any expenditure found by the regulatory authority to be unreasonable, unnecessary, or not in the public interest, including but not limited to executive salaries, advertising expenses, legal expenses, and civil penalties or fines.

The regulatory authority may promulgate reasonable rules and regulations with respect to the allowance or disallowance of any expenses for ratemaking purposes.

Cogenerator or small-power producer; agreement with electric utility for purchase of capacity; certification by commission

Sec. 41A. (a) In this section "qualifying facility" means a qualifying cogenerator or a qualifying small-power producer, as defined by Sections 3(18)(C) and 3(17)(D), respectively, Federal Power Act (16 U.S.C. Sections 796(18)(C) and 796(17)(D)).

(b) If an electric utility and a qualifying facility enter into an agreement providing for the purchase of capacity, the electric utility or qualifying facility may submit a copy of the agreement to the commission for certification under this section. The agreement may provide that it is contingent on that certification. Before the deadline specified by Subsection (d) of this section, the commission shall determine whether:

(1) the payments provided for in the agreement over the contract term are equal to or less than the utility's avoided costs as established by the commission and in effect at the time the agreement was signed. Contracts entered into before the effective date of this section may not be submitted for certification by the commission; and

(2) the agreement provides the electric utility the opportunity to acquire the cogeneration or small-power production installation before the installation is offered to another purchaser in the event of its abandonment, or provides other sufficient assurance that the electric utility will be provided with a comparable supply of electricity, if the qualifying facility ceases to operate the installation.

(c) If the commission determines that the agreement meets the requirements of Subdivisions (1) and (2) of Subsection (b) of this section, it shall certify that the agreement meets these requirements. If the commission does not make a determination under Subsection (b) of this section before the deadline specified by Subsection (d) of this section, the agreement is considered to meet the requirements of Subdivisions (1) and (2) of Subsection (b) of this section and certification is considered granted. A certification is effective until the earlier of 15 years after the date of the certification or the expiration date of the agreement.

(d) The commission shall make its determination under this section within 90 days after the date that the agreement is submitted, unless before this deadline the electric utility, the qualifying facility, or an affected person requests a hearing or the commission on its own motion decides to hold a hearing. If a hearing is requested or the commission decides to hold a hearing, the commission shall hold the hearing and make its determination within 120 days after the date that the agreement is submitted, except that this deadline is extended two days for each day in excess of five days on which the commission conducts a hearing on the merits of the case.

(e) In setting the electric utility's rates for a period during which the certification is effective, the regulatory authority shall consider payments made under the agreement to be reasonable and necessary operating expenses of the electric utility. The regulatory authority shall allow full, concurrent, and monthly recovery of the amount of the payments.

Self-insurance

Text of section as added by Acts 1989, 71st Leg., ch. 388, § I

Sec. 41B. (a) A public utility may self-insure all or a portion of its potential liability or catastrophic property loss, including windstorm, fire, and explosion losses which could not have been reasonably anticipated and included under operating and maintenance expenses. The commission shall approve a self-insurance plan under this section if it finds that the coverage is in the public interest and the plan is a lower cost alternative to purchasing commercial insurance, considering all costs, and that ratepayers will receive the benefits of that saving.

(b) In computing a utility's reasonable and necessary expenses under Subsection (c) of Section 41 of this Act, the regulatory authority shall allow as a necessary expense the funds credited to reserve accounts for the self-insurance, to the extent the regulatory authority finds it in the public interest. After the reserve account is established, the regulatory authority shall consider if the reserve account has a surplus or shortage in determining the utility's rate base. A surplus in the reserve account will exist if the charges against the reserve account are less than the funds credited to the reserve. A shortage in the reserve account will exist if the charges against the account are greater than the funds credited to the reserve. The regulatory authority shall subtract any surplus from and

add any shortage to the rate base.

(c) The regulatory authority shall determine reasonableness under Subsection (b) of this section from information provided at the time the self-insurance plan and reserve account are established and upon the filing of each rate case by a utility that has such a fund.

(d) The commission shall adopt rules governing self-insurance under this section.

(e) The allowance for self-insurance under this Act for ratemaking purposes will not be applicable to nuclear plant investment.

Interference with terms or conditions of employment

Text of section as added by Acts 1989, 71st Leg., ch. 1182, § 1

Sec. 41B. The commission shall not have the authority to interfere with employee
wages and benefits, working conditions, or other terms or conditions of employment that are the product of a collective bargaining agreement recognized under federal law.
Employee wage rates and benefit levels that are the product of such bargaining shall be presumed reasonable.

Unreasonable or violative existing rates; investigating costs of obtainingservice from another source

Sec. 42. Whenever the regulatory authority, after reasonable notice and hearing, on its own motion or on complaint by any affected person, finds that the existing rates of any public utility for any service are unreasonable or in any way in violation of any provision of law, the regulatory authority shall determine the just and reasonable rates, including maximum or minimum rates, to be thereafter observed and in force, and shall fix the same by order to be

served on the public utility; and such rates shall constitute the legal rates of the public utility until changed as provided in this Act. Whenever a public utility does not itself produce or generate that which it distributes, transmits, or furnishes to the public for compensation, but obtains the same from another source, the regulatory authority shall have the power and authority to investigate the cost of such production or generation in any investigation of the reasonableness of the rates of such public utility.

Statement of intent to change rates; major changes; hearing; suspension of rateschedule; determination of rate level

Sec. 43. (a) No utility may make changes in its rates except by filing a statement of intent with the regulatory authority having original jurisdiction at least 35 days prior to the effective date of the proposed change. The statement of intent shall include proposed revisions of tariffs and schedules and a statement specifying in detail each proposed change, the effect the proposed change is expected to have on the revenues of the company, the classes and numbers of utility consumers affected, and such other information as may be required by the regulatory authority's rules and regulations. A copy of the statement of intent shall be mailed or delivered to the appropriate officer of each affected municipality, and notice shall be given by publication in conspicuous form and place of a notice to the public of such proposed change once in each week for four successive weeks prior to the effective date of the proposed change in a newspaper having general circulation in each county containing territory affected by the proposed change, and by mail to such other affected persons as may be required by the regulatory authority's rules and regulations. Provided, however, nothing in this subsection shall apply to a water or sewer utility that:

(1) has fewer than 150 customers; and

(2) is not a member of a group filing a consolidated tax return; and

(3) is not under common control or ownership with another water or sewer utility.

(b) The regulatory authority, for good cause shown, may, except in the case of major changes, allow changes in rate to take effect prior to the end of such 35 day period under such conditions as it may prescribe, subject to suspension as provided herein. All such changes shall be indicated immediately upon its schedules by such utility. "Major changes" shall mean an increase in rates which would increase the aggregate revenues of the applicant more than the greater of $100,000 or two and one-half percent, but shall not include changes in rates allowed to go into effect by the regulatory authority or made by the utility pursuant to an order of the regulatory authority after hearings held upon notice to the public.

(c) Whenever there is filed with the Regulatory Authority any schedule modifying or resulting in a change in any rates than in force, the Regulatory Authority shall on complaint by any affected person or may on its own motion, at any time within 30 days from the date when such change would or has become effective, and, if it so orders, without answer or other formal pleading by the utility, but on reasonable notice, including notice to the governing bodies of all affected municipalities and counties, enter on a hearing to determine the propriety of such change. The Regulatory Authority shall hold such a hearing in every case in which the change constitutes a major change in rates, provided that an informal proceeding may satisfy this requirement if no complaint has been received before the expiration of 45 days after notice of the change shall have been filed. In each case where the commission determines it is in the public interest to collect testimony at a regional hearing for the inclusion in the record, the commission shall hold a regional hearing at an appropriate location. A

regional hearing iS DOt required ill a case involving a water, sewer, or member-owned utility, unless the commission determines otherwise.

(d) Pending the hearing and decision, the local Regulatory Authority, after delivery to the affected utility of a statement in writing of its reasons therefor, may suspend the operation of the schedule for a period not to exceed 90 days beyond the date on which the schedule of rates would otherwise go into effect and the commission may suspend the operation of the schedule for a period not to exceed 150 days beyond the date on which the schedule would otherwise go into effect. If the Regulatory Authority does not make a final determination concerning any schedule of rates prior to expiration of the period or periods of suspension, the schedule shall be deemed to have been approved by the Regulatory Authority. However, the 150-day period shall be extended two days for each one day of actual hearing on the merits of the case that exceeds 15 days. This approval is subject to the authority of the Regulatory Authority thereafter to continue a bearing in progress. The Regulatory Authority may in its discretion fix temporary rates for any period of suspension under this section. During the suspension by the Regulatory Authority as above provided, the rates in force when the suspended schedule was filed shall continue in force unless the Regulatory Authority shall establish a temporary rate. The Regulatory Authority shall give preference to the hearing and decision of questions arising under this section over all other questions pending before it and decide the same as speedily as possible.

(e) If the 150-day period has been extended, as provided for in Subsection (d) of Section 43 of this Act, and the commission fails to make its final determination of rates within 150 days from the date that the proposed change otherwise would have gone into effect, the utility concerned may put a changed rate, not to exceed the proposed rate, into effect upon the filing with the regulatory authority of a bond payable to the

regulatory authority in an amount and with sureties approved by the regulatory authority conditioned upon refund and in a form approved by the regulatory authority. The utility concerned shall refund or credit against future bills all sums collected during the period of suspension in excess of the rate finally ordered plus interest at the current rate as finally determined by the regulatory authority.

(f) If, after hearing, the Regulatory Authority finds the rates to be unreasonable or in any way in violation of any provision of law, the Regulatory Authority shall determine the level of rates to be charged or applied by the utility for the service in question and shall fix the same by order to be served upon the utility; these rates are thereafter to be observed until changed, as provided by this Act.

(g)(1) A rate or tariff set by the commission shall not authorize a utility to automatically adjust and pass through to its customers changes in fuel or other costs of the utility.

(2)(A) Any revision of a utility's billings to its customers to allow for the recovery of additional fuel costs may be made only upon a public hearing and order of the commission.

(B) The commission may consider any evidence that is appropriate and in the public interest at such hearing.

(C) A proceeding under this subsection shall not be considered a rate case under Section 43 of this Act.

(3) The commission may, after a hearing, grant interim relief for fuel cost increases that are the result of unusual and emergency circumstances or conditions.

(4)(A) This subsection applies only to increases or decreases in the cost of purchased
electricity which have been:

(i) accepted by a federal regulatory authority; or

(ii) approved after a hearing by the Public Utility Commission of Texas.

(B) The Public Utility Commission of Texas may utilize

any appropriate method to provide for the adjustment of the cost of purchased electricity upon such terms and conditions as the commission may determine. Such purchased electricity costs may be recovered concurrently with the effective date of the changed costs to the purchasing utility or as soon thereafter as is reasonably practical.

(h) A water or sewer utility exempted in Subsection (a) of this section may change its rates by filing a statement of change with the commission at least 30 days after providing notice of the change to its customers. The changed rates may be put into effect on the filing of the statement of change. At the request of one-tenth of the customers of the utility within 60 days after the day the rates are put into effect, the commission may hold a hearing, which may be an informal proceeding. On a finding by the commission that the changed rates are not just and reasonable, the commission shall set the utility's rates according to its usual procedure. The utility shall refund or credit against future bills all sums collected since the filing of the statement of change in excess of the rate finally set plus interest at the current rate as finally determined by the commission. No filing for a rate change under this section may be made for a period of six months from the last such filing by the same utility.

(i) If the commission does not make a final determination concerning a local exchange company's schedule of rates prior to the expiration of the 150-day suspension period, the schedule of rates finally approved by the commission shall become effective and the local exchange company shall be entitled to collect such rates from the date the 150-day suspension period expired. Any surcharges or other charges necessary to effectuate this subsection shall not be recovered over a period of less than 90 days from the date of the commission's final order.

Changes by local exchange companies; hearings; suspension of proposed changes

Sec. 43A. A local exchange company may make changes in its tariffed rules, regulations, or practices that do not affect its charges or rates by filing the proposed changes with the commission at least 35 days prior to the effective date of the changes. The commission may require such notice to ratepayers as it considers appropriate. The commission may on complaint by any affected person or on its own motion hold a hearing, after reasonable notice, to determine the propriety of the change. Pending the hearing and decision, the commission may suspend the operation of the proposed changes for a period not to exceed 120 days after the date on which the changes would otherwise gp into effect. The commission shall approve, deny, or modify the proposed changes before expiration of the suspension period. In any proceeding under this section, the burden of proving that the requested relief is in the public interest and complies with this Act shall be borne by the local exchange company.

Cooperative or small local exchange companies; statement of intent to change rates; notice of intent; suspension of rate schedule; review

Sec. 43B. (a) Except as otherwise provided by this section, a local exchange company that is a cooperative corporation or that has fewer than 5,000 access lines iii service iii this state may change rates by publishing notice of the change at least 60 days before the date of the change in the place and form as prescribed by the commission. The notice must include:

(1) the reasons for the rate change;

(2) a description of the affected service;

(3) an explanation of the right of the subscriber to petition the commission for a hearing. on the rate change; and

(4) a list of rates that are affected by the proposed rate

change.

(b) At least 60 days before the date of the change, the local exchange company shall file with the commission a statement of intent to change rates containing:

(1) a copy of the notice required by Subsection (a) of this section;

(2) the number of access lines the company has in service in this state;

(3) the date of the most recent commission order setting rates of the company;

(4) the increase in total gross annual local revenues that will be produced by the proposed rates;

(5) the increase in total gross annual local revenues that will be produced by the proposed rates together with any local rate changes which went into effect during the 12 months preceding the proposed effective date of the requested rate change and any other proposed local rate changes then pending before the commission;

(6) the increase in rates for each service category; Ind

(7) other information the commission by rule requires.

(c) The commission shall review a proposed change in the rates set by a local exchange company under this section upon the receipt of complaints signed by at least five percent of all affected subscribers or upon its own motion. The commission may require notice to ratepayers as it considers appropriate. If sufficient complaints are presented to the commission within 60 days after the date notice of the rate change was sent to subscribers, the commission shall review the proposed change. After notice to the local exchange company, the commission may suspend the rates during the pendency of the review and reinstate the rates previously in effect. Review under this subsection shall be as provided by Section 43 of this Act. The period for review by the commission does not begin until the local exchange company files a complete rate-filing package.

(d) If the commission has entered an order setting a rate, the affected local exchange company may not change that rate under this section before 365 days after the date of the commission's order setting the rate.

(e) This section does not prohibit a local exchange company from filing for a rate change under any other applicable section of this Act.

(f) The commission shall review a proposed change in the rates of a local exchange company under this section if the proposed rates, together with any local rate changes which went into effect during the 12 months preceding the proposed effective (late of the requested rate change as well as any other proposed local rate changes then pending before the commission, will increase its total gross annual local revenues by more than 2 1/2 percent or if the proposed change would increase the rate of any service category by more than 25 percent, except for basic local service, which shall be limited to a maximum of 2 1/2 percent of the total gross annual local revenue. Review under this subsection shall be as provided by Section 43 of this Act. Each local exchange company may receive a change in its local rates or in any service category pursuant to this section only one time in any 12-month period.

(g) Rates established under this section must be in accordance with the rate-setting principles of Article VI of this Act.

(h) The commission is granted all necessary power and authority to prescribe and collect fees and assessments from local exchange companies necessary to recover the commission's and the Office of Public Utility Counsel's costs of activities carried out and services provided under Subsection (i) of Section 43 and Sections 43A and 43B of this Act.

Rates for areas not within municipality

Sec. 44. Public utility. rates for areas not within any municipality shall not exceed without commission approval 115

percent of the average of all rates for similar services of all municipalities served by the same utility within the same county.

Unreasonable preference or prejudice as to rates or services

Sec. 45. No public utility may, as to rates or services, make or grant any unreasonable preference or advantage to any corporation or person within any classification, or subject any corporation or person within any classification to any unreasonable prejudice or disadvantage. No public utility may establish and maintain any unreasonable differences as to rates of service either as between localities or as between classes of service.

Equality of rates and services

Sec. 46. No public utility may, directly or indirectly, by any device whatsoever or in any manner, charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered by the utility than that prescribed in the schedule of rates of the public utility applicable thereto when filed in the manner provided in this Act, nor may any person knowingly receive or accept any service from a public utility for a compensation greater or less than that described in the schedules, provided that all rates being charged and collected by a public utility upon the effective date of this Act may be continued until schedules are filed. Nothing in this Act shall prevent a cooperative corporation from returning to its members the whole, or any part of, the net earnings resulting from its operations in proportion to their purchases from or through the corporation.

Discrimination; restriction on competition

Sec. 47. No public utility may discriminate against any person or corporation that sells or leases equipment or performs services in competition with the public utility, nor

may any public utility engage in any other practice that tends to restrict or inhibit such competition.

Payments in lieu of taxes

Sec. 48. No payments made in lieu of taxes by a public utility to the municipality by which it is owned may be considered an expense of operation for the purpose of determining, fixing, or regulating the rates to be charged for the provision of utility service to a school district or hospital district. No rates received by a public utility from a school district or hospital district may be used to make or to cover the cost of making payments in lieu of taxes to the municipality by which the public utility is owned.

Telecommunications utility providing service to the state; delinquent payment charges

Sec. 48A. A telecommunications utility providing any service to the state, including service to an agency in any branch of state government, may not charge a fee, penalty, interest, or other charge for delinquent payment of a bill for that service.

ARTICLE VII. CERTIFICATES OF CONVENIENCE AND NECESSITY

Definitions

Sec. 49. For the purposes of this article only: (a) "Retail public utility" means any person, corporation, water supply or sewer service corporation, municipality, political subdivision or agency, or cooperative corporation, now or hereafter operating, maintaining, or controlling in Texas facilities for providing retail utility service.

(b) For the purposes of this article only, "public utility" includes a water supply or sewer service corporation.

Certificate required

Sec. 50. Beginning one year after the effective date of this Act, unless otherwisespecified:

(1) No public utility may in any way render service directly or indirectly to the public under any franchise or permit without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require such installation, operation, or extension.

(2) Except as otherwise provided in this article no retail public utility may furnish, make available, render, or extend retail public utility service to any area to which retail utility service is being lawfully furnished by another retail public utility on or after the effective date of this Act, without first having obtained a certificate of public convenience and necessity that includes the area in which the consuming facility is located.

Exceptions for extension of service

Sec. 51. (a) A public utility is not required to secure a certificate of public convenience and necessity for:

(1) an extension into territory contiguous to that already served by it and not receiving similar service from another public utility and not within the area of public convenience and necessity of another utility of the same kind;

(2) an extension within or to territory already served by it or to be served by it under a
certificate of public convenience and necessity; or

(3) operation, extension, or service in progress on the effective date of this Act.

(b) Any extensions allowed by Subsection (a) of this section shall be limited to devices for interconnection of existing facilities or devices used solely for transmitting public utility services from existing facilities to customers of retail utility service.

Application; maps; evidence of consent

Sec. 52. (a) A public utility shall submit to the commission an application to obtain a certificate of public convenience and necessity or an amendment thereof.

(b) On or before 90 days after the effective date of this Act, or at a later date on request in writing by a public utility when good cause is shown, or at such later dates as the commission may order, each public utility shall file with the commission a map or maps showing all its facilities and illustrating separately facilities for generation, transmission, and distribution of its services.

(c) Each applicant for a certificate shall file with the commission such evidence as is required by the commission to show that the applicant has received the required consent, franchise, or permit of the proper municipality or other public authority.

Prior construction or operation

Sec. 53. On application made to the commission within six months after the effective date of this Act, the commission shall issue a certificate of public convenience and necessity for the construction or operation then being conducted to any public utility actually providing service to any geographical area on the effective date of this Act, or to any person or corporation actively engaged on the effective date of this Act in the construction, installation, extension, or improvement of, or addition to, any facility or system used or to be used in providing public utility service.

Notice and hearing; issuance or refusal; factors considered; filing of notice of intent by electric utilities; time for approval or denial of new transmission facilities

Sec. 54. (a) When an application for a certificate of public convenience and necessity is filed, the commission shall

give notice of such application to interested parties Ind, if requested, shall fix a time and place for a hearing and give notice of the hearing. Any person interested in the application may intervene at the hearing.

(b) Except for certificates for prior operations granted under Section 53, the commission may grant applications and issue certificates only if the commission finds that the certificate is necessary for the service, accommodation, convenience, or safety of the public. The commission may issue the certificate as prayed for, or refuse to issue it, or issue it for the construction of a portion only of the contemplated system or facility or extension thereof, or for the partial exercise only of the right or privilege.

(c) Certificates of convenience and necessity shall be granted on a nondiscriminatory basis after consideration by the commission of the adequacy of existing service, the need for additional service, the effect of the granting of a certificate on the recipient of the certificate and on any public utility of the same kind already serving the proximate area, and on such factors as community values, recreational and park areas, historical and aesthetic values, environmental integrity, and the probable improvement of service or lowering of cost to consumers in such area resulting from the granting of such certificate.

(d) In addition to the requirements of this section, an electric utility applying for certificate of convenience and necessity for a new generating plant must first file a notice of intent to file an application for certification.

(1) The notice of intent shall set out alternative methods considered to help meet the electrical needs, related electrical facilities, and the advantages and disadvantages of the alternatives. In addition, the notice shall indicate compatibility with the most recent long-term forecast provided in this Act.

(2) The commission shall conduct a hearing on the notice of intent to determine the appropriateness of the

proposed generating plant as compared to the alternatives and shall issue a report on its findings. In conjunction with the issuance of the report, the
commission shall render a decision approving or disapproving the notice. Such decision shall be rendered within 180 days from the date of filing the notice of intent.

(e) On approval of the notice of intent, a utility may apply for certification for a generating plant, site, and site facilities no later than 12 months before construction is to commence.

(1) The application for certification shall contain such information as the commission may require to justify the proposed generating plant, site, and site facilities and to allow a determination showing compatibility with the most recent forecast.

(2) Certificates of convenience and necessity shall be granted on a nondiscriminatory basis if the commission finds that the proposed new plant is required under the service area forecast, that it is the best and most economical choice of technology for that service area as compatible with the commission's forecast, and that conservation and alternative energy sources cannot meet the need.

(f) If the application for a certificate of convenience and necessity involves new transmission facilities, the commission shall approve or deny the application within one year after the date the application is filed. If the commission does not approve or deny the application before this deadline, any party may seek a writ of mandamus in a district court of Travis County to compel the commission to make a decision on the application.

Area included within city, town or village

Sec. 55. (a) If an area has been or shall be included within the boundaries of a city, town, or village as the result of annexation, incorporation, or otherwise, all public utilities

certified or entitled to certification under this Act to provide service or operate facilities in such area prior to the inclusion shall have the right to continue and extend service in its area of public convenience and necessity within the annexed or incorporated area, pursuant to the rights granted by its certificate and this Act.

(b) Notwithstanding any other provision of law, a public utility shall have the right to continue and extend service within its area of public convenience and necessity and to utilize the roads, streets, highways, alleys, and public property for the purpose of furnishing such retail utility service, subject to the authority of the governing body of a municipality to require any public utility, at its own expense, to relocate its facilities to permit the widening or straightening 'of streets by giving to the public utility 30 days' notice and specifying the new location for the facilities along the right-of-way of the street or streets.

(e) This section may not be construed as limiting the power of cities, towns, and villages to incorporate or extend their boundaries by annexation, nor may this section be construed as prohibiting any city or town from levying taxes and other special charges for the use of the streets as are authorized by Section 182.025, Tax Code.

(d) Where a municipal corporation offers retail electric utility service in a city of more than 135,000 population located in a county of more than 1,500,000 population according to the last federal decennial census, the commission shall singly certificate areas within the corporate limits of such municipality where more than one electric utility provides electric utility service within such corporate limits. In singly certificating such areas, the commission shall preserve the respective electric utilities' rights to serve the customers such electric utilities are serving on the effective date of this subsection. Provided, however, the foregoing shall not apply to customers served, at least partially, by a nominal 69,000 volts system,

who have given notice of termination to the utility servicing that customer prior to the effective date of this subsection.

Contracts valid and enforceable

Sec. 56. Contracts between retail public utilities designating areas to be served and customers to be served by those utilities, when approved by the commission, shall be valid and enforceable and shall be incorporated into the appropriate areas of public convenience and necessity.

Preliminary order for certificate

Sec. 57. If a public utility desires to exercise a right or privilege under a franchise or permit which it contemplates securing but which has not as yet been granted to it, such public utility may apply to the commission for an order preliminary to the issuance of the certificate. The commission may thereupon make an order declaring that it will, on application, under such rules as it prescribes, issue the desired certificate on such terms and conditions as it designates, after the public utility has obtained the contemplated franchise or permit. On presentation to the commission of evidence satisfactory to it that the franchise or permit has been secured by the public utility, the commission shall issue the certificate.

Continuous and adequate service; discontinuance, reduction or impairment of service

Sec. 58. (a) Except as provided by this section or Section 58A of this Act, the holder of any certificate of public convenience and necessity shall serve every consumer within its certified area and shall render continuous and adequate service within the area or areas.

(b) Unless the commission issues a certificate that neither the present or future convenience and necessity will be adversely affected, the holder of a certificate shall not discontinue, reduce, or impair service to a certified service area

or part thereof except for:

(1) nonpayment of charges;

(2) nonuse; or

(3) other similar reasons in the usual course of business.

(c) Any discontinuance, reduction, or impairment of service, whether with or without approval of the commission, shall be in conformity with and subject to such conditions, restrictions, and limitations as the commission shall prescribe.

Conditions requiring refusal of service

Sec. 58A. The holder of a certificate of public convenience and necessity shall refuse to serve a customer within its certified area if the holder of the certificate is prohibited from providing the service under Section 212.012 or 232.0047, Local Government Code.

Sale, assignment or lease of certificate

Sec. 59. If the commission determines that a purchaser, assignee, or lessee is capable of rendering adequate service, a public utility may sell, assign, or lease a certificate of public convenience and necessity or any rights obtained under the certificate. The sale, assignment, or lease shall be on the conditions prescribed by the commission.

Interference with other public utility

Sec. 60. If a public utility in constructing or extending its lines, plant, or system interferes or attempts to interfere with the operation of a line, plant, or system of any other public utility, the commission may issue an order prohibiting the construction or extension or prescribing terms and conditions for locating the lines, plants, or systems affected.

Improvements in service; interconnecting service; extended area toll-free telephone service

Sec. 61. After notice and hearing, the commission

may:

(1) order a public utility to provide specified improvements in its service in a defined area, if service in such area is inadequate or is substantially inferior to service in a comparable area and it is reasonable to require the company to provide such unproved service;

(2) order two or more public utilities to establish specified facilities for the interconnecting service; and

(3) order a telephone company or telephone companies to provide extended area toll-free service within a specified metropolitan area where there is a sufficient community of interest within the area and such service can reasonably be provided.

Revocation or amendment of certificate

Sec. 62. (a) The commission at any time after notice and hearing may revoke or amend any certificate of convenience and necessity if it finds that the certificate holder has never provided or is no longer providing service in the area, or part of the area, covered by the certificate.

(b) When the certificate of any public utility is revoked or amended, the commission
may require one or more public. utilities to provide service in the area in question.

ARTICLE VIII. SALE OF PROPERTY AND MERGERS

Report of sale, merger, etc.; investigation; disallowance of transaction Sec. 63. No public utility may sell, acquire, lease, or rent any plant as an operating unit or system in this state for a total consideration in excess of $100,000 or merge or consolidate with another public utility operating in this state unless the public utility reports such transaction to the commission within a reasonable time. All transactions involving the sale of 50 percent or more of the stock of a

public utility shall also be reported to the commission within a reasonable time. On the filing of a report with the commission, the commission shall investigate the same with or without public hearing, to determine whether the action is consistent with the public interest. In reaching its determination, the commission shall take into consideration the reasonable value of the property, facilities, or securities to be acquired, disposed of, merged or consolidated. If the commission finds that such transactions are not in the public interest, the commission shall take the effect of the transaction into consideration in the rate-making proceedings and disallow the effect of such transaction if it will unreasonably affect rates or service. The provisions of this section shall not be construed as being applicable to the purchase of units of property for replacement or to the addition to the facilities of the public utility by construction.

Purchase of voting stock in another public utility: report

Sec. 64. No public utility may purchase voting stock in another public utility doing
business in Texas, unless the utility reports such purchase to the commission.

Loans to stockholders: report

Sec. 65. No public utility may loan money, stocks, bonds, notes, or other evidences of indebtedness to any corporation or person owning or holding directly or indirectly any stock of the public utility unless the public utility reports the transaction to the commission within a reasonable time.

Sec. 66. Repealed by Acts 1983, 68th Leg., p. 1222, ch. 263, § 25, eff. Sept. 1, 1983.

ARTICLE IX. RELATIONS WITH AFFILIATED INTERESTS

Jurisdiction over affiliated interests

Sec. 67. The commission shall have jurisdiction over affiliated interests having transactions with public utilities under the jurisdiction of the commission to the extent of access to all accounts and records of such affiliated interests relating to such transactions, including but in no way limited to accounts and records of joint or general expenses, any portion of which may be applicable to such transactions.

Disclosure of substantial interest in voting securities

Sec. 68. The commission may require the disclosure of the identity and respective interests of every owner of any substantial interest in the voting securities of any public utility or its affiliated interest. One percent or more is a substantial interest within the meaning of this section.

ARTICLE X. JUDICIAL REVIEW

Right to judicial review; evidence; commission as party defendant

Sec. 69. Any party to a proceeding before the commission is entitled to judicial review under the substantial evidence rule. The commission shall be a party defendant in any such proceeding represented by the attorney general.

Costs and attorney's fees

Sec. 70. Any party represented by counsel who alleges that existing rates are excessive or that those prescribed by the commission are excessive, and who is a prevailing party in proceedings for review of a commission order or decision, may in the same action recover against the regulation fund

reasonable fees for attorneys and expert witnesser and other costs for its efforts before the commission and the court, the amount of such attorneys' fees to be fixed by the court. On a finding by the court that an action under this article was groundless and brought in bad faith and for the purpose of harassment the court may award to the defendant public utility the reasonable attorneys' fees

ARTICLE XI. VIOLATIONS AND ENFORCEMENT

Action to enjoin or require compliance

Sec. 71. Whenever it appears to the commission that any public utility or any other person or corporation is engaged in, or is about to engage in, any act in violation of this Act or of any order, rule, or regulation of the commission entered or adopted under the provisions of this Act, or that any public utility or any other person or corporation in failing to comply with the provisions of this Act or with any such rule, regulation, or order, the attorney general on request of the commission, in addition to any other remedies provided herein, shall bring an action in a court of competent jurisdiction in thE name of and on behalf of the commission against such public utility or other person o? corporation to enjoin the commencement or continuation of any such act, or to require compliance with such Act, rule, regulation, or order.

Receivership

Sec. 71A. (a) At the request of the commission, the attorney general shall bring suit for the appointment of a receiver to collect the assets and carry on the business of a water or sewer utility that violates a final order of the commission or allows any property owned or controlled by it to be used in violation of a final order of the commission.

(b) The court shall appoint a receiver if such appointment is necessary to guarantee the collection of

assessments, fees, penalties, or interest, to guarantee continued service tc the customers of the utility, or to prevent continued or repeated violation of the final order.

(c) The receiver shall execute a bond to assure the proper performance of the receiver's duties in an amount:to be set by the court.

(d) After appointment and execution of bond the receiver shall take possession of the assets of the utility specified by the court. Until discharged by the court, tile receiver shall perform the duties that the court directs to preserve the assets and carry on the business of the utility and shall strictly observe the final order involved.

(e) Upon a showing of good cause by the utility, the court may dissolve the receivership and order the assets and control of the business returned to tile utility.

Payment of costs of receivership

Sec. 71B. The receiver may, subject to the approval of the court and after giving notice to all interested parties, sell or otherwise dispose of real or personal property, or any part thereof, of a water or sewer utility against which a proceeding has been brought under this article for the purpose of paying for the costs incurred in the operation of the receivership. Said costs shall include but are not limited to the payment of fees to the receiver for his services; payment of fees to attorneys, accountants, engineers, or any other person or entity which provides goods or services necessary to the operation of tile receivership; payment of costs incurred in ensuring any property owned or controlled by a water or sewer utility is not used in violation of a final order of the commission.

Penalty against public utility or affiliated interest

Sec. 72. (a) Any public utility, water supply or sewer service corporation, or affiliated interest that knowingly violates a provision of this Act, fails to perform a duty imposed on it,

or fails, neglects, or refuses to obey an order, rule, regulation, direction, or requirement of the commission or decree or judgment of a court, shall be subject to a civil penalty of not less than $1,000 nor more than $5,000 for each offense.

(b) A public utility, water supply or sewer service corporation, or affiliated interest commits a separate offense each day it continues to violate the provisions of Subsection (a) of this section.

(c) The attorney general shall institute suit on his own initiative or at the request of, in the name of, and on behalf of the commission, in a court of competent jurisdiction to recover the penalty under this section.

Penalty for violating section 6 of this Act

Sec. 73. (a) Any member of the commission, or any officer or director of a public utility or affiliated interest, shall be subject to a civil penalty of $1,000 for each and every knowing violation of Section 6 of this Act, such penalty to be recovered in a suit filed in a court of competent jurisdiction by the attorney general on his own initiative or at the request of, in the name of, and on behalf of, the commission.

(b) Any person, other than an officer or director of a public utility or affiliated interest or a member of the commission, shall be subject to a civil penalty of $500 for each and every knowing violation of Section 6 of this Act, such penalty to be recovered iii a suit filed in a court of competent jurisdiction by the attorney general on his own initiative or at the request of, in the name of, and on behalf of the commission.

(c) Any member, officer, or employee of the commission found in any action by a preponderance of the evidence to have violated any provision of Section 6 of this Act shall be removed from his office or employment.

Civil penalty for violations resulting in pollution

Sec. 73A. (a) If a public utility or any other person or corporation under the jurisdiction of the railroad commission pursuant to this Act violates this Act and the violation results in pollution of the air or water of this state or poses a threat to the public safety, the public utility or any other person may be assessed a civil penalty by the railroad commission.

(b) The penalty may not exceed $10,000 a day for each violation. Each day a violation continues may be considered a separate violation for purposes of penalty assessments.

(c) In determining the amount of the penalty, the railroad commission shall consider the public utility's, person's, or corporation's history of previous violations of this Act, the seriousness of the violation, any hazard to the health or safety of the public, and the demonstrated good faith of the permittee or public utility, person, or corporation charged.

(d) A civil penalty may be assessed only after the public utility, person, or corporation charged with a violation described under Subsection (a) of this section has been given an opportunity for a public hearing.

(e) If a public hearing has been held, the railroad commission shall make findings of fact, and it shall issue a written decision as to the occurrence of the violation and the amount of the penalty that is warranted, incorporating, when appropriate, an order requiring that the penalty be paid.

(f) If appropriate, the railroad commission shall consolidate the hearings with other proceedings under this Act.

(g) If the public utility, Person, or corporation charged with the violation fails to avail itself of the opportunity for a public hearing, a civil penalty may be assessed by the railroad commission after it has determined that a violation did occur and the amount of the penalty that is warranted.

(h) The railroad commission shall then issue an order requiring that the penalty be paid.

(i) On the issuance of an order finding that a violation

has occurred, the railroad commission shall inform the public utility, person, or coil)oration charged within 30 days of the amount of the penalty.

(j) Within the 30-day period immediately following the day on which the decision or order is final as provided in Section 16(c), Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes), the public utility, person, or corporation charged with the penalty shall:

(1) pay the penalty in full; or

(2) if the public utility, person, or corporation seeks judicial review of either the amount of the penalty or the fact of the violation, or both:

(A) forward the amount to the railroad commission for placement in an escrow account; or

(B) in lieu of payment into escrow, post a supersedeas bond with the railroad commission under the following conditions. If the decision or order being appealed is the first final railroad commission decision or order assessing any administrative penalty against the public utility, person, or corporation, the railroad commission shall accept a supersedeas bond. In the case of appeal of any subsequent decision or order assessing any administrative penalty against the public utility, person, or corporation, regardless of the finality of judicial review of any previous decision or order, the railroad commission may accept a supersedeas bond. Each supersedeas bond shall be for the amount of the penalty and in a form approved by the railroad commission and shall stay the collection of the penalty until all judicial review of the decision or order is final.

(k) If through judicial review of the decision or order it is determined that no violation occurred or that the amount of the penalty should be reduced or not assessed, the railroad commission shall, within the 30-day period immediately following that determination, if the penalty has been paid to the

railroad commission, remit the appropriate amount to the public utility, person, or corporation with accrued interest, or where a supersedeas bond has been posted, the railroad commission shall execute a release of such bond.

(l) Failure to forward the money to the railroad commission within tile time provided by Subsection U) of this section results in a waiver of all legal rights to contest the violation or the amount of the penalty.

(m) Civil penalties owed under this section may be recovered in a civil action brought by the attorney general at the request of the railroad commission.

(n) Judicial review of the order or decision of the railroad commission assessing the penalty shall be under the substantial evidence rule and shall be instituted by filing a petition with the district court of Travis County, Texas, and not elsewhere, as provided for in Section 19, Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes).

Personal penalty

Sec. 74. (a) Except as provided by Section 87B of this Act, any person or persons who willfully and knowingly violate the provisions of this Act shall be guilty of a third degree felony.

(b) All penalties accruing under this Act shall be cumulative and a suit for the recovery of any penalty shall not be a bar to or affect the recovery of any other penalty, or be a bar to any criminal prosecution against any public utility or any officer, director, agent, or employee thereof or any other corporation or person.

Contempt proceedings

Sec. 75. If any person fails to comply with any lawful order of the commission or with any subpoena or subpoena duces tecum or if any witness refuses to testify about any

matter on which he may be lawfully interrogated, the commission may apply to any court of competent jurisdiction to compel obedience by proceedings for contempt.

Disposition of fines and penalties

Sec. 76. Fines and penalties collected under this Act in other than criminal proceedings shall be paid to the commission and paid by the commission to the state treasury to be placed in the general revenue fund.

Venue

Sec. 77. Suits for injunction or penalties under the provisions of this Act may be brought in Travis County, in any county where such violation is alleged to have occurred, or in the county or residence of any defendant.

ARTICLE XII. COMMISSION FINANCING

Assessments upon public utilities

Sec. 78. An assessment is hereby imposed upon each public utility within the commission's jurisdiction, including interexchange telecommunications carriers, serving the ultimate consumer equal to one-sixth of one percent of its gross receipts from rates charged the ultimate consumers in Texas for the purpose of defraying the costs and expenses incurred in the administration of this Act. Thereafter the commission shall, subject to the approval of the Legislature, adjust this assessment to provide a level of income sufficient to fund the commission and the office of public utility counsel. Any interexchange telecommunications carrier found dominant as to any service market under Section 100(b) or filing a petition under Section 100(f) of this Act shall be required to reimburse the Office of Public Utility Counsel for the costs of participation before the commission on behalf of residential ratepayers in any of the proceedings under Section 100 of this

Act to the extent found reasonable by the commission. Recovery of costs under this section by the Office of Public Utility Counsel shall not exceed $175,000 per annum. Nothing in this Act or any other provision of law shall prohibit interexchange telecommunications carriers who do not provide local exchange telephone service from collecting the fee imposed under this Act as an additional item separately stated on the customer bill as "Utility Gross Receipts Assessment."

Payment dates; delinquency

Sec. 79. All assessments shall be due on August 15 of each year. Any public utility may instead make quarterly payments due on August 15, November 15, February 15, and May 15 of each year. There shall be assessed as a penalty an additional fee of 10 percent of the amount due for any late payment. Fees delinquent for more than 30 days shall draw interest at the rate of 10 percent per annum on the assessment and penalty due.

Collection and payment into general revenue fund

Sec. 80. All fees, penalties, and interest paid under the provisions of Sections 78 and 79 of this article shall be collected by the comptroller of public accounts and paid into the general revenue fund. The commission shall notify the comptroller of public accounts of any adjustment of the assessment imposed in Section 78 when made.

Approval of budget

Sec. 81. The budget of the commission shall be subject to legislative approval as part of the appropriations act.

Accounting records; audit

Sec. 82. The commission shall keep such accounting records as required by the comptroller. The financial

transactions of the commission are subject to audit by tile state auditor in accordance with Chapter 321, Government Code.

ARTICLE XIII. MISCELLANEOUS PROVISIONS

Complaint by any affected person

Sec. 83. (a) Any affected person may complain to the regulatory authority in writing setting forth any act or thing done or omitted to be done by any public utility in violation or claimed violation of any law which the regulatory authority has jurisdiction to administer, or of any order, ordinance, rule, or regulation of the regulatory authority. The commission shall keep an information file about each complaint filed with the commission relating to a utility. The commission shall retain the file for a reasonable period.

(b) If a written complaint is filed with the commission relating to a utility, the commission, at least as frequently as quarterly and until final disposition of tile complaint, shall notify the parties to the complaint of the status of the complaint unless the notice would jeopardize an undercover investigation.

Record of proceedings; right to hearing

Sec. 84. A record shall be kept of all proceedings had before the regulatory authority, and all the parties shall be entitled to be heard in person or by attorney.

Judicial stay or suspension of order, ruling or decision

Sec. 85. During the pendency of an appeal, the district court, the court of civil appeals, or the supreme court, as the case may be, may stay or suspend, in whole or in part, the operation of the regulatory authority order, ruling, or decision and such courts in granting or refusing a stay or suspension shall act in accordance with the practice of courts exercising equity jurisdiction.

Sec. 86. [Blank]

Assumption of jurisdiction

Sec. 87. (a) The regulatory authority shall assume jurisdiction and all powers and duties of regulation under this Act on January 1, 1976, except as provided in Subsection (b) of this section.

(b) The regulatory authority shall assume jurisdiction over rates and service of public utilities on September 1, 1976.

Certain water and sewer utility property included in rate base; valuation used; depreciation expense

Sec. 87A. (a) The provisions of this section apply notwithstanding any other provision of this Act.

(b) Water and sewer utility property in service which was acquired from an affiliate or developer prior to September 1, 1976, included by the utility in its rate base shall be included in all ratemaking formulae and at the installed cost of the property rather than the price set between the entities. Unless the funds for this property are provided by explicit customer agreements, the property shall be considered invested capital and shall not be considered contributions in aid of construction or customer-contributed capital.

(c) Depreciation expense included in cost of service shall include depreciation on all currently used, depreciable utility property owned by the utility.

Dedicated line long distance service

Text of § 87B as added by Acts 1985, 69th Leg., ch. 407, § 2, and amended by Acts 1987, 70th Leg., ch. 1018, § 1.

Sec. 87B. A telecommunications utility providing dedicated line long distance service (TEXAN) to the state on August 31, 1987, shall continue to have this type of service

available to the state on a month-to-month contract basis until September 1, 1988 . The contract will become effective on September 1, 1987, and shall be under terms and conditions negotiated by the state and the utility in accordance with the amounts appropriated by the General Appropriations Act for this purpose. The State Purchasing and General Services Commission shall perform all actions necessary to insure that one or more contracts for telecommunications services as provided in Article 10 of the State Purchasing and General Services Act (Article 601b, Vernon's Texas Civil Statutes) (TEXAN II) are awarded pursuant to the requirements of the State Purchasing and General Services Act (Article 601b, Vernon's Texas Civil Statutes) by October 15, 1987, and that TEXAN II is operational no later than August 31, 1988. Those funds appropriated by the General Appropriations Act for extending the existing TEXAN contract which are not expended in fiscal year 1988 shall be transferred to the State Purchasing Ind General Services Commission for the sole purpose of offsetting the expenses associated with the administration of the TEXAN II network. If, during the period of nine this section is in effect, any:supplemental or other telecommunications service is required by the state, it may be acquired from vendors other than the utility or utilities providing TEXAN or TEXAN II service.

Automatic dial announcing device; use; penalty

Text of § 87B as added by Acts 1985, 69th Leg., ch. 450, § 1

Sec. 87B. (a) In this section, "automatic dial announcing device" means automatic equipment used for telephone solicitation or collection that:

(1) is capable of storing telephone numbers to be called, or has a random or sequential number generator capable of producing numbers to be called; and

(2) is capable, alone or in conjunction with other equipment, to convey a prerecorded or synthesized voice message to the number called.

(b) A person may not use an automatic dial announcing device unless:

(1) the person has obtained a permit from the commission and given written notice specifying the type of device to each telecommunications utility over whose system the device is to be used;

(2) the device is not used for random number dialing or to dial numbers determined by successively increasing or decreasing integers;

(3) the message conveyed by the device, or a message delivered by a human, states the nature of the call and the identity of the person, company or organization making the call;

(4) the device disconnects from the called person's line not later than 10 seconds after the called person hangs up; and

(5) for calls terminating in the State of Texas, the device is not used to make a call (a) on a Sunday before 1:30 p.m; or after 9 p.m., or before 9 a.m. or after 9 p.m. on a weekday or a Saturday, when the device is used for solicitation; or (b) at any hour that collection calls would be prohibited under the federal Fair Debt Collection Practices Act, 15 U.S.C. Section 801 et seq., when the device is used for collection purposes.

(c) A telecommunications utility may disconnect or refuse to connect service to a person using or intending to use an automatic dial announcing device if the utility determines that the device is not capable of disconnecting from a called party's line as required by this section or that the device would cause or is causing network harm. The telecommunications utility shall disconnect service to the person on a determination by the commission or a court that the person;is violating this section, and may reconnect service to the person only on a

determination by the commission that the person will comply with this section. The utility shall give notice to the person using the device of its intent to disconnect service not later than the third day before the date of the disconnection, except that if the device is causing network congestion or blockage, the notice may be given on the day before the date of disconnection.

(d) This section does not apply to the use of an automatic dial announcing device to call a person who has given to the person making the call written permission to be called by an automatic dial announcing device, except that a telecommunications utility may disconnect service to a person using the device if the device is causing network harm.

(e) An application for a permit under this section to use one or more automatic dial announcing devices must be accompanied by a fee in a reasonable amount calculated to cover the enforcement cost to the commission not to exceed $500, as determined by the commission. The proceeds of the fees shall be deposited in the general revenue fund.

(f) A person who operates an automatic dial announcing device in violation of this section commits an offense. An offense under this section is a Class C misdemeanor. Sec. 88. Repeated by Acts 1987, 70th Leg., ch. 654, § 7(b), eff. Sept. 1, 1987.

Commission as resource center, development of energy efficient school facilities

Sec. 88A. The commission may serve as a resource center to assist school districts in developing energy efficient facilities. As such, the commission may:

(1) present to school districts programs relating to managing energy, training school plant operators, and designing energy efficient buildings;

(2) provide school districts with technical assistance in managing energy;

(3) collect and distribute information relating to energy management in school facilities; and

(4) offer to educators energy resource workshops and may make available to educators a film library on energy-related matters and energy education lesson packages.

Liberal construction

Sec. 89. This Act shall be construed liberally to promote the effectiveness and efficiency of regulation of public utilities to the extent that such construction preserves the validity of this Act and its provisions. The provisions of this Act shall be construed to apply so as not to conflict with any authority of the United States.

Repealer; prior rules and regulations to remain in effect

Sec. 90. (a) Articles 1119, 1121, 1122, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1268, 1423, 1424, and 1425, Revised Civil Statutes of Texas, 1925, as amended; Section 8a, Chapter 283, Acts of the 40th Legislature, Regular Session, 1927 (Article 1011i, Vernon's Texas Civil Statutes) and all other laws and parts of laws in conflict with this Act are repealed effective September 1, 1976.

(b) All rules and regulations promulgated by regulatory authorities in the exercise of their jurisdiction over public utilities, as defined in this Act, shall remain in effect until such time as the commission or railroad commission promulgates provisions applicable to the exercise of the commission's or railroad commission's jurisdiction over public utilities.

Terminating services to elderly and disabled; criteria and guidelines; establishment

Sec' 91. The Public Utility Commission is authorized to establish criteria and guidelines with the utility industry relating to procedures employed by the industry in terminating services to the elderly and disabled.

Severability

Sec. 92. If any provision of this Act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Interexchange services; local exchange companies' rates

Sec. 93. Local exchange companies' rates for interexchange telecommunications services must be statewide average rates unless the commission on application and hearing orders otherwise. Nothing in this section limits a local exchange company's ability to enter into contracts for high speed private line services of 1.544 megabits or greater under the provisions of Section 18 of this Act.

Sec. 93A (Blank]

Hotels or motels; charges for telephone calls

Sec. 93B. The amount a hotel or motel charges for a local telephone call, a credit card telephone call, a collect telephone call, or any other local telephone call for which assistance from the hotel or motel operator is not required may not exceed 50 cents.

ARTICLE XIV. TELECOMMUNICATIONS SERVICE ASSISTANCE PROGRAM; UNIVERSAL SERVICE FUND

Tel-assistance service

Sec. 94. The commission shall adopt and enforce rules requiring each local exchange company to establish a telecommunications service assistance program to be called "tel-assistance service." This service is established to provide eligible consumers with a reduction in costs of

telecommunications services.

Eligibility for tel-assistance service; burden of proof; billing

Sec. 95. (a) To be eligible for tel-assistance service, an applicant must be a head of household, 65 years of age or older, and disabled as determined by the Texas Department of Human Services and must have a household income at or below the poverty level as determined by the United States Office of Management and Budget and reported annually in the Federal Register. The department, in accordance with this article and rules adopted by the department for the program, shall develop procedures for taking applications for certification of eligibility and for determining program eligibility. The burden of proving eligibility for tel-assistance service is on the consumer applying for the service.

(b) Each six months the department shall provide a list or lists of the names, addresses, and, if applicable, telephone numbers of all persons eligible for tel-assistance service to each local exchange company. The local exchange company shall determine from the list those consumers to whom the company provides service and within 60 days after receiving the list shall begin tel-assistance billing for eligible consumers. This billing shall continue until the local exchange company is notified by the department that a consumer is no longer eligible to receive tel-assistance service.

Tel-assistance services; billing; rates

Sec. 96. (a) The local exchange company shall provide tel-assistance service to all eligible consumers within its certificated area in the form of a reduction on each eligible consumer's telephone bill. The reduction shall apply only to the following types of service:

(1) residential flat rate basic local exchange service;

(2) residential local exchange access service; and

(3) residential local area calling usage, except that the

reduction for local area calling usage shall be limited to an amount such that together with the reduction for local exchange access service the rate does not exceed the comparable reduced flat rate for the service.

(b) No other local voice service may be provided to the dwelling place of a tel-assistance consumer, nor may single or party line optional extended area service, optional extended area calling service, foreign zone, or foreign exchange service be provided to a tel-assistance consumer. Nothing in this section shall prohibit a person otherwise eligible to receive tel-assistance. service from obtaining and using telecommunications equipment designed to aid such person in utilizing telecommunications services.

(c) The reduction allowed by the telecommunications service assistance program shall be 65 percent of the applicable tariff rate for the service provided.

Statewide telecommunications relay access service for hearing-impaired and speech-impaired

Sec. 96A. (a) The commission shall adopt and enforced rules establishing a statewide telecommunications relay access service for the hearing-impaired and speech-impaired using specialized communications equipment such as telecommunications devices for the deaf (TDD) and operator translations. The purpose of this section is to provide for the uniform and coordinated provision of the service on a statewide basis by one telecommunications carrier.

(b) On or before January 1, 1990, the commission shall adopt rules establishing a statewide telecommunications relay access service for the hearing-impaired and speech impaired with the following provisions:

(1) the service shall provide the hearing-impaired and speech-impaired with access to the telecommunications network in Texas equal to that provided other customers; (2) the service shall begin on or before September 1, 1990;

(3) the service shall consist of the following:

(A) switching and transmission of the call;

(B) verbal and print translations by either live or automated means between hearing-impaired and speech-impaired individuals who use TDD equipment or similar automated devices and others who do not have such equipment; and

(C) other service enhancements proposed by the carrier and approved by the commission;

(4) the calling or called party shall bear no charge for calls originating and terminating within the same local calling area;

(5) the calling or called party shall bear one-half of the total charges established by contract with the commission for intrastate interexchange calls;

(6) as specified in its contract with the commission, charges reltaed to providing the service which are not borne by a calling or called party pursuant to Subdivisions (4) and (5) of this subsection shall be funded from the universal service fund;

(7) local exchange carriers shall not impose interexchange carrier access charges on calls which make use of this service and which originate and terminate in the same local calling area;

(8) local exchange carriers shall provide billing and collection services in support of this service at just and reasonable rates; and

(9) if the commission orders a local exchange company to provide for a trial telecommunications relay access service for the hearing-impaired or speech-impaired, all pertinent costs and design information from this trial shall be available to the general public.

(c) The commission shall allow telecommunications utilities to recover their universal service fund assessment related to this service through a surcharge which the utility may add to its customers' bills. The commission shall specify how

the amount of the surcharge is to be determined by each utility. If a utility chooses to impose the surcharge, the bill shall list the surcharge as the "universal service fund surcharge."

(d) For the purpose of funding the start-up costs of this service and for the first year of the service, the commission shall require that 55 percent of the funds shall come from local exchange carriers and that 45 percent of the funds shall come from all other telecommunications utilities. At the end of the first year of tile service, the commission shall set the appropriate assessments for the funding of the service by all telecommunications utilities. In setting the appropriate assessments after the first year for funding of the service, the commission shall consider the aggregate calling pattern of the users of the service and all other factors found appropriate and in the public interest by the commission. The commission shall review the assessments annually and adjust the assessments as found appropriate hereunder.

(e) On or before April 1, 1990, the commission shall select the telecommunications carrier which will provide the statewide telecommunications relay access service for "he hearing-impaired and speech-impaired. In awarding the contract for this service, the commission shall make a written award of the contract to the offerer whose proposal is the most advantageous to the state, considering price, the interests of the hearing-impaired and speech-impaired community in having access to a high quality and technologically advanced telecommunications system, and all other factors listed in the commission's request for proposals. The commission shall consider each proposal in a manner that does not disclose the contents of the proposal to competing offerers. The commission's evaluation of the proposals shall include:

(1) charges for the service;

(2) service enhancements proposed by the offerers;

(3) technological sophistication of the network proposed by the offerers; and

(4) the proposed commencement date for the service.

(f) The telecommunications carrier providing the service shall be compensated for providing such service at rates, terms, and conditions established in its contract with the commission. This compensation may include a return on the investment required to provide the service and compensation for unbillable and uncollectible calls placed through the service, provided that compensation for unbillable and uncollectible calls shall be subject to a reasonable limitation as determined by the commission.

(g) On or before September 15, 1989, the commission shall appoint an advisory committee to assist the commission in administering this section.

(1) The advisory committee shall be composed of:

(A) two deaf persons recommended by the Texas Association of the Deaf;

(B) one hearing-impaired person recommended by Self-Help for the Hard of Hearing;

(C) one hearing-impaired person recommended by the American Association of Retired Persons;

(D) one deaf and blind person recommended by the Texas Deaf/Blind Association;

(E) one speech-impaired person and one speech-impaired and hearing-impaired person recommended by the Coalition of Texans with Disabilities;

(F) two representatives of telecommunications utilities, one representing a nonlocal exchange utility and one representing a local exchange carrier, chosen from a list of candidates provided by the Texas Telephone Association;

(G) two persons, at least one of whom is deaf, with experience in providing relay services recommended by the Texas Commission for the Deaf; and

(H) two public members recommended by organizations representing consumers of telecommunications services.

(2) The commission shall appoint advisory committee

members based on recommended lists of candidates submitted in accordance with Paragraph (F) of Subdivision (1) of this subsection.

(3) The advisory committee shall monitor the establishment, administration, and promotion of the statewide telecommunications relay access service and advise the commission in pursuing a service which meets the needs of the hearing-impaired and speech-impaired in communicating with other users of telecommunications services.

(4) The terms of office of each member of the advisory committee shall be two years. A member whose term has expired shall continue to serve until a qualified replacement is appointed.

(5) The members of the advisory committee shall serve without compensation but shall be entitled to reimbursement at rates established for state employees for travel and per them incurred in the performance of their official duties.

(6) The commission shall reimburse members of the advisory committee in accordance with Subdivision (5) of this subsection and shall provide clerical and staff support to the advisory committee, including a secretary to record the committee meetings.

(7) The commission's costs associated with the advisory committee shall be reimbursed from the universal service fund.

Recovery of lost revenues

Sec. 97. A local exchange company is entitled to recover the lost revenue, if any, resulting solely from the provision of tel-assistance service from the universal service fund, the establishment of which is provided for by this Act.

Universal service fund

Sec. 98. (a) The commission shall adopt and enforce rules requiring local exchange companies to establish a universal service fund to assist local exchange companies in

providing basic local exchange service at reasonable rates in high cost rural areas, to reimburse local exchange companies for revenues lost as a result of providing tel-assistance service under this Act, to reimburse the telecommunications carrier providing the statewide telecommunications relay access service for the hearing-impaired and speech-impaired as authorized in Section 96A of this Act, and to reimburse the Texas Department of Human Services and the Public Utility Commission of Texas for costs incurred in implementing the provisions of this article.

(b) The universal service fund shall be funded by a statewide uniform charge, at rates and on services determined by the commission, payable by all telecommunications utilities that have access to the customer base. In establishing the uniform level of the charge and the services to which it will apply, the commission may not make or grant an unreasonable preference or advantage to a telecommunications utility or subject a telecommunications utility to unreasonable prejudice or disadvantage. The charge shall be paid in accordance with procedures approved by the commission.

(c) The commission shall:

(1) establish, in a manner that assures reasonable rates for basic local exchange service, eligibility criteria it finds necessary for participation in the universal service fund;

(2) determine which local exchange companies meet the eligibility criteria;

(3) determine the amount of and approve a procedure for reimbursement to local exchange companies of revenue lost in providing tel-assistance service under this Act;

(4) prescribe and collect fees from the universal service fund necessary to recover the costs the Texas Department of Human Services and the Public Utility Commission incurred in implementing and administrating the provisions of this Article; and

(5) approve procedures for the collection and disbursal

of the revenues of the universal service fund.

(d) The commission shall adopt rules for the implementation and administration of the universal service fund.

(e) The commission may do all things necessary and convenient to implement and administer the universal service fund.

Severability

Sec. 99. If this article conflicts with another provision of this Act, this article prevails.

Interexchange telecommunications carriers; determination of dominant carriers; separation of costs

Sec. 100. (a) The provisions of this section are applicable only to interexchange telecommunications carriers which do not provide local exchange service. A carrier dominant under this section for a service market is a dominant carrier for that service market under Section 3(c)(2) of this Act.

(b) The commission shall on or before November 1, 1987, initiate an evidentiary proceeding to determine whether any interexchange telecommunications carrier is dominant, as defined by Subsection 3(c)(2)(B) of this Act and in consideration of the relevant factors in Subsection (h) of this section, as to any service market as determined by the commission. The proceeding must result in a determination of dominance or nondominance in each service market no later than December 31, 1988. For the purposes of this section, the term "service market" shall mean the relevant market for each telecommunications service, and such markets shall be geographically statewide. The commission may group services which are closely related into one service market. Failure of the commission to make any determination required by this subsection by December 31, 1988, shall entitle any affected party to petition for a writ of mandamus or any other

extraordinary relief from any court of competent jurisdiction to compel the commission to make the required determination.

(c) In connection with the proceeding required in Subsection (b) of this section, the commission shall determine the status of interLATA interexchange competition, the effect of such competition on the public interest, and whether any interLATA interexchange carrier has sufficient market power as to any service market or markets to enable it to control prices in a manner adverse to the public interest. The commission shall report its findings and its recommendations for legislation, if any, to the legislature before January 15, 1989.

(d) If the commission finds that an interexchange telecommunications carrier is not a dominant carrier as to any service market, such carrier shall be subject as to such service only to those provisions of this Act applicable to nondominant carriers. An interexchange telecommunications carrier shall remain subject to the provisions of this Act applicable to dominant carriers in any service market in which that carrier remains or is found by the commission to be dominant. Any interexchange telecommunications carrier which is dominant as to any service provided in any service market shall be presumed dominant as to any new service which is the same as, equivalent to, or substitutable within the same service market for such dominant service. Any new service markets are subject to the approval and determination of dominance by the commission.

(e) The commission shall on or before November 1, 1987, initiate a rulemaking proceeding to determine a method and develop a framework for the separation of costs among any fully regulated services, regulated competitive services, and unregulated services for the purposes of Subsections (k) and (l) of this section. The purpose of this proceeding shall be to establish a methodology for separation of these costs in any subsequent proceedings relating to the rates for fully regulated

services. This proceeding shall not be an inquiry into the specific costs or rates of any telecommunications carrier. The commission shall take evidence to assist in the development of a methodology and shall allow for cross-examination of witnesses limited to the purposes of this subsection. Information required by the commission to carry out the requirements of this section may be obtained pursuant to the authority granted by Section 101 of this Act. The commission shall adopt rules pursuant to this subsection no later than November 1, 1988. Failure of the commission to make the required determinations on or before November 1, 1988, shall entitle any affected party to petition for a writ of mandamus or any other extraordinary relief from any court of competent jurisdiction to compel the commission to make the required determination.

(f) Any interexchange telecommunications carrier found dominant in any service market in the proceeding required by Subsection (b) of this section may petition the commission for a determination of whether the carrier is no longer a dominant carrier in any one or more service markets. Upon the request of any affected party or oil its own motion, the commission shall hold a hearing and shall make its determination under this subsection within 185 days of the filing of this petition. Unless otherwise authorized by the commission, no interexchange telecommunications carrier may file a petition under this paragraph until after January 15, 1990. The commission shall establish reasonable rules regarding the frequency of filing such petitions under this subsection.

(g) An interexchange telecommunications carrier seeking to be found nondominant in any service market pursuant to Subsections (b) and (f) of this section shall have the burden of proof to show such nondominance and shall provide all information required by the commission; provided that such carrier shall not have the burden to produce any information which is solely in the possession or control of another person

or persons and which that person or persons refuse to provide; however, nothing in this subsection shall alter or reduce the overall burden of proof of such carrier as to dominance.

(h) In making any determination required by Subsections (b) and (f) of this section, the commission shall consider all factors it considers relevant to its determination, including but not limited to the following:

(1) the number and size of telecommunications utilities and other persons providing the same, equivalent, or substitutable service in the relevant market;

(2) the extent to which the same, equivalent, or substitutable service is available iii the relevant market,

(3) the ability of customers in the relevant market to obtain the same, equivalent, or substitutable services at comparable rates, terms, and conditions;

(4) the ability of telecommunications utilities or other persons to make the same, equivalent, or substitutable service readily available in the relevant market at comparable rates, terms, and conditions;

(5) the degree to which alternative interexchange facilities are available to resellers of interexchange telecommunications service;

(6) the market share of interexchange telecommunications utilities or other persons providing the same, equivalent, or substitutable service or services in the relevant market;

(7) the existence of any significant barrier to the entry or exit of a provider of the service in the relevant market,

(8) the extent to which one-plus equal access is available to interexchange telecommunications carriers and end users;

(9) the financial condition of telecommunications utilities or other persons providing the same, equivalent, or substitutable service in the relevant market insofar as shown by public information and documents.

(i) The legislature finds that the rules adopted by the

commission and published in the Texas Register, Vol. 12, Number 25 (12 Tex.Reg. 1083), are within the authority granted by this Act and are hereby validated. This section shall not be construed to expand the authority of the commission under Section 18(a) of this Act as adopted in 1983.

(j) For the purposes of this section, a regulated competitive service is defined as a service provided by an interexchange telecommunications carrier which is dominant in that service market for which the commission has determined that sufficient competition exists or for which the commission has determined that sufficient competition exists such that it is in the public interest to utilize a range of rates; a fully regulated service is defined as a service provided by an interexchange telecommunications carrier which is dominant in that service market and which is not a regulated competitive service.

(k) It is further the policy of this state to ensure that any fully regulated services of interexchange telecommunications utilities do not subsidize either directly or indirectly the unregulated services or regulated competitive services of such utilities. In that regard, fully regulated services shall not recover any of the direct, indirect, joint, or common costs, including any increased cost due to the risk of competition, not associated with fully regulated services. It is the purpose of this section to direct the commission and grant the commission the authority necessary to assure that any fully regulated services offered by interexchange telecommunications utilities do not subsidize unregulated services or regulated competitive services.

(l) The commission shall not allow any fully regulated services offered by interexchange telecommunications utilities to recover any of the direct, indirect, joint, or common costs, including any increased costs due to the risk of competition, not associated with the fully regulated services offered by such utilities.

Investigative and subpoena powers

Sec. 101. Notwithstanding any other provision of this Act, the commission is granted all investigative and subpoena powers necessary to obtain any information necessary to carry out the requirements of Section 100 of this Act and in connection therewith may call and hold hearings and issue subpoenas to compel the attendance of witnesses and the production of papers and documents.

Sec. 3(c) amended by Acts 1981, 67th Leg., p. 70, ch. 31, § 1, eff. April 10, 1981; Acts 1981, 67th Leg., p. 312, ch. 123, § 1, eff. May 13, 1981; Acts 1981, 67th Leg., p. 2442, ch. 626, § 1, eff. Aug. 31, 1981; Sec. 16A added by Acts 1981, 67th Leg., p. 71, ch. 31, § 2, eff. April 10, 1981; Sec. 19(b) amended by Acts 1981, 67th Leg., p. 2443, ch. 626, § 2, eff. Aug. 31, 1981; Sec. 38 amended by Acts 1981, 67th Leg., p. 2749, ch. 751, § 1, eff. June 16, 1981; Sec. 43(a) amended by Acts 1981, 67th Leg., p. 2561, ch. 683, § 1, eff. Aug. 31, 1981; Sec. 43(g) added by Acts 1981, 67th Leg., p. 2562, ch. 683, § 2, eff. Aug. 31, 1981; Sec. 62(c) to (e) added by Acts 1981, 67th Leg., p. 2562, ch. 683, § 3, eff. Aug. 31, 1981; Sees. 71A, 71B added by Acts 1981, 67th Leg., p. 49, ch. 24, § 1, eff. April 7, 1981; Sec. 80 amended by Acts 1981, 67th Leg., p. 2563, ch. 683, § 4, eff. Aug. 31, 1981. Amended by Acts 1983, 68th Leg., p. 1259, ch. 274, § 1, eff. Sept. 1, 1983. Sec. 3(c) amended by Acts 1983, 68th Leg., p. 496, ch. 99, § 2, eff. Sept. 1, 1983; Acts 1983, 68th Leg., p. 1217, ch. 263, § 21, eff. Sept. 1, 1983; Sec. 3(g), (i) amended by Acts 1983, 68th Leg., p. 1217, ch. 263, § 21, eff. Sept. 1, 1983; Secs. 20, 21, 25, 26 amended by Acts 1983, 68th Leg., p. 1222, ch. 263, § 26, eff. Sept. 1, 1983; Sec. 27(a), (b), (d) amended by Acts 1983, 68th Leg., p. 1220, ch. 263, § 22, eff. Sept. 1, 1983; Sec. 28 amended by Acts 1983, 68th Leg., p. 646, ch. 146, § 1, eff. Aug. 29, 1983; Acts 1983, 68th Leg., p. 1222, ch. 263, § 26, eff. Sept. 1, 1983; Sec. 29(a) amended by Acts 1983, 68th Leg., p. 1221, ch. 263, § 23, eft Sept. 1,

1983; Sees. 33, 37, 38 amended by Acts 1983, 68th Leg., p. 1222, ch. 263, § 26, eff. Sept. 1, 1983; Sec. 41 amended by Acts 1983, 68th Leg., p. 647, ch. 146, § 2, eff. Aug. 29, 1983; Sec. 44 amended by Acts 1983, 68th Leg., p. 1222, ch. 263, § 26, eff. Sept. 1, 1983; Sec. 49(b) amended by Acts 1983, 68th Leg., p. 1222, ch. 263, § 24, eff. Sept. 1, 1983; Sec. 55(d) added by Acts 1983, 68th Leg., p. 2624, ch. 448, § 1, eff. June 17, 1983; Secs. 63 to 65, 67, 68, 71, 72 amended by Acts 1983, 68th Leg., p. 1222, ch. 263, § 26, eft Sept 1, 1983; Sec. 73A added by Acts 1983, 68th Leg., p. 1413, ch. 286, § 4, eff. Sept. 1, 1983; Secs. 75, 76 amended by Acts 1983, 68th Leg., p. 1222, ch. 263, § 26, eft Sept. 1, 1983; Sec. 79 amended by Acts 1983, 68th Leg., p. 456, ch. 93, § 14, eff. Sept. 1, 1983; Act.,3 1983, 68th Leg., p. 1366, ch. 282, § 1, eff. June 9, 1983; Sec. 5a amended by Acts 1985, 69th Leg., ch. 479, § 87, eff. Sept. 1, 1985; Acts 1985, 69th Leg., ch. 729, § 33, eft Sept. 1, 1985; Sec. 6(a) amended by Acts 1985, 69th Leg., ch. 479, § 7, eff. Sept. 1, 1985; Sec. 74(a) amended by Acts 1985, 69th Leg., ch. 450, § 2, eff. Sept. 1, 1985; Sec. 87B added by Acts 1985, 69th Leg., ch. 407, § 2, eff. Sept. 1, 1985; Acts 1985, 69th Leg., ch. 450, § 1, eff. Sept. 1, 1985; Sec. 3(c) amended by Acts 1987, 70th Leg., el). 414, §.1, eff. Sept. 1, 1987; Sec. 3(v) added by Acts 1987, 70th Leg., ch. 371, § 1, eff. Sept. 1, 1987; Sec. 4 amended by Acts 1987, 70th Leg., ch. 150, § 1, eff. Aug. 31, 1987; See, 8(d) amended by Acts 1987, 70th Leg., ch. 150, § 2, eff. Aug. 31, 1987; Sec. 18(c), (d) amended by Acts 1987, 70th Leg., ch. 414, § 2, eff. Dee. 31, 1988; Sec. 18(e) to (k) added by Acts 1987, 70th Leg., ch. 371, § 3, eff. Sept. 1, 1987; Sec. 18(1) to (r) added by Acts 1987, 70th Leg, ch. 414, § 2, eff. Dee. 31, 1988; Sec. 38 amended by Acts 1987, 70th Leg., ch. 371, § 2, eff. Sept. 1, 1987; Sec. 40 amended by Acts 1987, 70th Leg., ch. 371, § 4, eff. Sept. 1, 1987; Sec. 41A added by Acts 1987, 70th Leg., ch. 308, § 1, eff. June 11, 1987; Sec. 43(i) added by Acts 1987, 70th Leg., ch. 371,

§ 5, eff. Sept. 1, 1987; Sees. 43A, 43B added by Acts 1987, 70th Leg., ch. 371, § 6, eff. Sept. 1, 1987; Sec. 48A added by Acts 1987, 70th Leg., ch. 1018, § 2, eff. Sept. 1, 1987; Sec. 54(f) added by Acts 1987, 70th L-eg., ch. 309, § 1, eff. June 11, 1987; Sec. 58(a) amended by Acts 1987, 70th Leg., ch. 1102, § 3, eff. Sept. 1, 1987; Sec. 58A added by Acts 1987, 70th Leg., ch. 1102, § 4, eff. Sept 1, 1987; Sec. 78 amended by Acts 1987, 70th Leg., ch. 414, § 3, eff. Dec. 31, 1988; Sec. 87B amended by Acts 1987, 70th Leg., ch. 1018, § 1, eff. Sept. 1, 1987; Sec. 88A added by Act.9 1987, 70th Leg., ch."147, § 5, eff. Sept. 1, 1987; Sec. 93 added by Acts 1987, 70th Leg., ch. 371, § 7, eff. Sept. 1, 1987; Sees. 94 to 99 added by Acts 1987, 70th Leg., ch. 371, § 8, eff. Sept. 1, 1987; Sees. 100, 101 added by Acts 1987, 70th Leg., ch. 414, § 4, eft Sept. 1, 1987; Sec. 3(c) amended by Acts 1989, 71st Leg., ch. 1154, § 1, eff. Sept. 1, 1989; Sec. 18(c) amended by Acts 1989, 71st Leg., ch. 1154, § 2, eff. Sept. 1, 1989; Sec. 18A added by Acts 1989, 71st Leg., ch. 1154, § 3, eff. Sept. 1, 1989; Sec. 26(c) amended by Acts 1989, 71st Leg., ch. 325, § 1, eff. Sept. 1, 1989; Sec. 26(c), (d) amended by Acts 1989, 71st Leg., ch. 1167, § 1, eff. Aug. 28, 1989; Sec. 26(c) amended by Acts 1989, 71st Leg., ch. 325, § 2, eff. Sept. 1, 1989; Sec. 26(e) amended by and (f), (g) added by Acts 1989, 71st Leg., ch. 1167, § 1, eff. Aug. 28, 1989; Sec. 35(c) added by Acts 1989, 71st Leg., ch. 735, § 1, eff. June 15, 1989; Sec. 41B added by Acts 1989, 71st Leg., ch. 388, § 1, eff. Sept. 1, 1989; Sec. 41B added by Acts 1989, 71st L-eg., ch. 1182, § 1, eff. Aug. 28, 1989; Sec. 58A amended by Acts 1989, 71st Leg., ch. 1, § 46(c), eff. Aug. 28, 1989; Sec. 58A amended by Acts 1989, 71st Leg., ch. 624, § 312, eff. Sept. 1, 1989; Sec. 82 amended by Acts 1989, 71st Leg., ch. 584, § 46, eff. Sept. 1, 1989; Sec. 93B added by Acts 1989, 71st Leg., ch. 1154, § 4, eff. Sept. 1, 1989; Sec. 96A added by Acts 1989, 71st Leg., ch. 1154, § 5, eff. Sept. 1, 1989; Sec. 98(a) amended by Acts 1989, 71st Leg., ch. 1154, § 6, eff.

Sept. 1, 1989.

Historical Note

The repealed § 88 authorized the commission to receive funds for and to administer various federal programs.

Section 16(b) of Acts 1983, 68th Leg., p. 457, ch. 93, provides:

"A provision of this Act that increases the interest rate on delinquent taxes applies to those taxes or assessments that are delinquent or become delinquent on or after the effective date of this Act."

Section 27 of Acts 1983, 68th Leg., p. 1229, ch. 263 provides:

"Rules and orders of the railroad commission adopted under the Public Utilities Regulatory Act (Article 1446c, Vernon's Texas Civil Statutes) and in effect September 1, 1983, remain in effect until changed under the Gas.Utility Regulatory Act."

Section 2 of Acts 1983, 68th Leg., p. 1321, ch. 274 provides:

'?his Act applies only to a proceeding in which the statement of intent or application is filed on or after the effective date of this Act. A proceeding in which the statement of intent or application is filed before the effective date of this Act is governed by the law in effect when the statement of intent or application was filed, and that law is continued in effect for that purpose."

Section 2(b) of Acts 1985, 69th Leg., ch. 407, provides:

"The expiration of Section 87B, Public Utility Regulatory Act (Article 1446c, Vernon's Texas Civil Statutes), as added by this Act, does not affect rights or liabilities regarding that law that accrue on or before the expiration date."

Section 10.003(a) to (e) of Acts 1985, 69th Leg-, ch. 795, provides:

"(a) The purpose of Article C, Part 3, of this Act is to transfer water and sewer utility regulation from the Public Utility Commission of Texas under the Public Utility Regulatory Act (Article 1446c, Vernon's Texas Civil Statutes) to the Texas Water Commission, and Chapter 13, Water Code, as added by this Act, is not intended to expand the jurisdiction, rights, powers, or duties of the Texas Water Commission in excess of those exercised by the Public Utility Commission of Texas before March 1, 1986. Further, Chapter 13, Water Code, is not intended to affect the jurisdiction and responsibilities for water rate regulation presently vested in tile Texas Water Commission under Title 2 of the Water Code. The transfer of water and sewer utility regulation from the Public Utility Commission of Texas to the Texas Water Commission does not impair or affect any act done or obligation, right, permit, license, standard or requirement, or penalty accrued or existing under the authority of the Public Utility Regulatory Act, and any prior action of the Public Utility Commission of Texas remains in force pertaining. to water and sewer utilities for the purpose of sustaining any proper action concerning such obligation, right, permit, license, standard or requirement, or penalty. No judicial action or proceeding instituted before March 1, 1986, is affected by the enactment of Chapter 13, Water Code.

"(b) On March 1, 1986, all equipment, data, documents, facilities, and other items of the Public Utility Commission of Texas pertaining to water and sewer utilities shall be transferred to the Texas Water Commission.

"(c) On March 1, 1986, the Texas Water Commission shall implement the powers and duties delegated to it by this Act. The commission, to the extent it considers advisable and under terms and conditions considered necessary and desirable, may contract with the Public Utility Commission of Texas to

provide for the disposition of all water and sewer utility matters docketed and pending before the Public Utility Commission of Texas on March 1, 1986, and the Public Utility Commission of Texas shall cooperate with the Texas Water Commission in assisting in the orderly transition of regulatory power contemplated by this Act. The contract may provide that the staff of the Public Utility Commission of Texas shall continue to process, analyze, investigate, provide evidence, and conduct hearings on the pending water and sewer utility matters consistent with this Act. Ally matter that requires a final decision, however, shall be reduced to a written proposal for decision conforming to the requirements of the Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes), which, together with the record, shall be submitted to the Texas Water Commission for final decision."

Provisions contained in § 88A of this article were formerly contained in art. 4413(47c), § 6A.

Section I of Acts 1987, 70th L-eg., ch. 147, § 5 of which added § 88A of this article, enacted Title 4 of the Government Code.

Section 2 of Acts 1987, 70th Leg., ch. 309 provides:

"This Act applies only to an application for a certificate of convenience and necessity filed on or after the effective date of this Act A certificate of convenience and necessity filed before the effective date of this Act is governed by the law in effect when it was filed, and that law is continued in effect for that purpose."

Section 9 of Acts 1987, 70th Leg., ch. 371 provides:

"(a) The Texas Department of Human Services shall provide the first list required by Section 95, Public Utility Regulatory Act (Article 1446c, Vernon's Texas Civil Statutes), and the Public Utility Commission of Texas shall adopt the initial rules required by Subsections (e) and (f) of Section 18 of that Act before January 1, 1988, and by Subsection (h) of Section 18 and by Section 98 of that Act before July 1, 1988.

"(b) All fees and assessments collected under Subsection (i), Section 18, and Subsection (h), Section 43B, Public Utility Regulatory Act (Article 1446c, Vernon's Texas Civil Statutes), are appropriated to the Public Utility Commission of Texas in an amount estimated to be $1,700,448 and to the Office of Public Utility Counsel in an amount not to exceed $509,802 to be used for the purposes specified in those sections for the biennium ending August 31, 1989. All fees collected under Subdivision (4), Subsection (c), Section 98, Public Utility Regulatory Act (Article 1446c, Vernon's Texas Civil Statutes), are appropriated to the Public Utility Commission of Texas in an amount not to exceed $300,000 and to the Texas Department of Human Services in an amount estimated to be $616,998 to be used for the purposes specified in that section for the biennium ending August 31, 1989."

Acts 1987, 70th Leg., ch. 654, § 9(b) to (d) provides:

"(b) All data, records, other personal property, and necessary personnel belonging or assigned to the energy efficiency division of the Public Utility Commission are transferred to the State Purchasing and General Services Commission on the effective date of this Act.

"(c) The central travel office of the travel division of the State Purchasing and General Services Commission shall extend its services to all state agencies not later than August 31, 1991.

"(d) The division of facilities planning and construction shall be designated the division of facilities construction and space management on the effective date of this Act."

Section 5 of Acts 1987, 70th Leg., 2nd C.S., ch. 52, art. 2 provides:

"Notwithstanding any requirement of Subsection (b), Section 9, S.B. No. 115, Acts of the 70th Legislature, Regular Session, 1987, Lo the contrary, all data, records, other personal property, and necessary personnel belonging or assigned to the energy efficiency division of the Public Utility Commission of Texas or the State Purchasing and General

Services Commission, as appropriate, are transferred to the office of the governor on the effective date of this Act."

Sections 2 to 4 of Acts 1989, 71st Leg., ch. 1167, provide:

"Sec. 2. Any municipally owned utility which falls under the provisions of this Act on its effective date shall adjust its rates to comply with the provisions of this Act by January 1, 1990, and shall not, prior to that date, increase base rates for service provided to ally independent school district in complying with this Act. No appeals may be filed under Section 1 of this Act prior to January 1, 1990.

"Sec. 3. When contracting with any municipally owned utility which falls under the provisions of this Act, any conservation and reclamation district operating under Chapter 74, Acts of the 64th Legislature, Regular Session, 1975, [Water Aux. Laws Table 111] is not subject to the provisions of Section 4a(b) and Section 4b, Chapter 166, Acts of the 63rd Legislature, Regular Session, 1973 (Article 1435a, Vernon's Texas Civil Statutes), notwithstanding any other provisions to the contrary.

"Sec. 4. If any provision of this Act or application thereof to any person or circumstances is held invalid, then such invalidity shall not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared severable."

Section 2 of Acts 1989, 71st Leg., ch. 1182, provides:

"This Act applies only to a proceeding before the regulatory authority initiated on or after the effective date of this Act."

Cross References

Apartment houses, utility service rules and regulations, enforcement pursuant to this article, see art. 1446f, § 2(b).

Enterprise zone act, other local incentives, see Vernon's

Ann.Civ.St. art. 5190.7, § 14.

Oil overcharge account, funding of Energy Resource Center for Texas Schools according to this act, see art. 4413(56), § 19.

Public utility counselor, employees, compensation from assessment under § 78 of this article, see art. 1446e, § 9.07(c).

Punishment,

Class C misdemeanor, see V.T.C.A. Penal Code, § 12.23.

Third-degree felony, see V.T.C.A. Penal Code, § 12.34.

DOCKET NO. 568

COMPLAINT OF SOUTHWESTERN BELL TELEPHONE COMPANY VERSUS MCI TELECOMMUNICATIONS CORPORATION, CPI MICROWAVE, INC., SOUTHERN PACIFIC COMMUNICATIONS COMPANY AND WESTERN UNION TELEGRAPH COMPANY

PUBLIC UTILITY COMMISSION OF TEXAS

DIRECT TESTIMONY OF SENATOR RONALD L. CLOWER

File Date: February 3, 1978

THE STATE OF TEXAS §
§ AFFIDAVIT
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared SENATOR RONALD L. CLOWER, known to me to be the person whose name is subscribed to the following affidavit and who stated to me on his oath:

"My name is Ronald L. Clower, and I am a practicing attorney and a member of the Texas Senate with my offices in Dallas, Dallas County, Texas.

"Attached hereto and made a part hereof for all purposes is my direct testimony in Docket No. 568 before the Public Utility Commission of Texas, including attached exhibits.

"I hereby swear and affirm that my answers contained in the attached testimony to the questions therein propounded are true and correct, to the best of my knowledge and belief."

/s/ Ronald L. Clower

SUBSCRIBED AND SWORN TO BEFORE ME this the 2nd day of February, 1978, to certify which witness my hand and seal of office.

/s/ Rosalyn North
Notary Public in and for
Dallas County, Texas

DIRECT TESTIMONY OF SENATOR RONALD L. CLOWER

1. Q Please state your full name.
   A Ronald L. Clower.
2. Q What is your occupation?
   A Attorney.
3. Q Are you a member of the Texas Legislature?
   A Yes.
4. Q When-were you initially elected?
   A 1972.
5. Q What Senatorial District do you represent?
   A District 9.
6. Q State your experience and knowledge with respect to utility legislation and regulation.
   A I was and am Chairman of the Senate Subcommittee on Consumer Affairs, which did interim studies between the 63rd and 64th Sessions (1973 and 1975) of the Legislature that in part led to enactment in the 64th Session of the Public Utility Regulatory Act. I have sponsored several bills relating to utilities during that period. I served on the State Affairs Committee during the 64th Session of the Legislature, which was the Senate Committee handling all the various public utility bills during that Session; and I served on the Conference Committee which issued the final Report on the bill that passed and resulted in the Public Utility Regulatory Act now in effect. As a result of my participation in the aforementioned activities and proceedings, I

became aware of the organization, structure and operations of utilities operating in Texas, including telephone companies. I also have acquired knowledge of the structure and operations of utility regulatory commissions in other states and, consequently, I am knowledgeable of the requirements which were and are necessary for the proper establishment and operations of such a commission in Texas.

7. Q Can you state when you or your committee first became involved in the concept of telephone regulation in Texas?

A Early in the 63rd Session, which was early in 1973.

8. Q Did you and other members of your committee reach any conclusions as to whether or not regulation of the telephone industry in Texas was necessary?

A Yes. Some of us felt regulation was necessary early on and, as events transpired, the vast majority of the members of the Legislature came to realize that some form of comprehensive regulation was called for.

9. Q What were those conclusions?

A For this proceeding, I will limit my answers to telephone utilities. First, telephone utilities are essentially, monopolistic and, as such, are guaranteed a profit-by the regulatory authority. Likewise, theoretically, the regulatory authority should regulate the utility's services to the public. We found a hodge-podge of attempted regulation in Texas.' Areas outside of cities were not subject to any regulation. Uninformed and lay city councils were not qualified to hear

a rate case and, as such, the telephone companies had a field day on rates. Almost no service regulation was attempted. Since there was no "market place" regulation of the vast majority of utility company services and rates, we felt that a comprehensive state-wide regulatory scheme was called for.

However, we also did not intend to transform or limit the competitive services offered by various manufacturers and transmission companies, who were engaging in competition with each other and with the telephone companies. In that connection, we were generally aware of previous decisions by the FCC and the courts which had created the beginnings of competition in certain segments of the communications industry.

In that early period, of course, our primary concern was with rates and services of the monopoly utilities, particularly-in the cities and towns in Texas. As the concept of regulation of the utilities progressed and these basic problems had been addressed, we turned our attention at a later time and, particularly in the 64th Session in 1975, to other concerns, including the need to preserve the growing competitive environment.

In short, we concluded that there was a "wasteland" of regulation in Texas, and that it would be essential to create a comprehensive regulatory act.

10. Q What action did you or other Senators in the Legislature take as a result of those conclusions?

A As I stated in my affidavit of September 27, 1977, filed with this Commission, a great deal of research was done on the whole subject of public utilities regulation prior to and during the 1975 session of the Legislature. Staff experts served the Subcommittee on Consumer Affairs of the Senate, of which I am Chairman, and the State Affairs Committee of the Senate, as well as the Transportation Committee and the State Affairs Committee of the House. In particular, Mr. Jack Hopper, a telephone industry,expert; Mr. Michael R. Thomasson, Chief of Staff of the Subcommittee on Consumer Affairs; Lawrence Veselka and Robert S. Bickerstaff, Legal Research and Administrative staff members assisting Lieutenant Governor William Hobby; and there were staff members on the committees of both the Senate and the House who were involved in this research. Additionally, Representative John Wilson and his staff worked on the research on House Bill 819. An analysis of the regulatory legislation enacted in prior years in other states of the United States was conducted to determine the strengths and weaknesses of those pieces of legislation and how, in fact, the Utility Commissions established by those Acts had worked. Additionally, engineering and legal experts from the telephone, gas and power utility companies operating in Texas had discussions with me, other Senators and Representatives, and the various staff personnel serving the Committees in both Houses. The Texas Public Utility Regulatory Act was one of the most thoroughly researched, discussed, and

debated pieces of legislation in many years in Texas, and all of us involved in the legislation received a large amount of data on regulatory principles and the operations, engineering, facilities and ratemaking factors involved in public utilities. Much of that information was obtained prior to the 1975 session and was supplemented by both staff experts and industry representatives throughout the session, which ended on June '2, 1975.

11. Q Would you please describe for the Commission the basic chronology of events before and during the legislative session of 1975, insofar as the Public Utility Regulatory Act and its adoption is concerned?

21. Q You mentioned the idea of competition in your previous answers. Can you tell me what role competition played in the Legislature's consideration of this Act?

A Yes, sir. I believe the Act makes that clear. In Section 2 of the Act, we point out that public utilities are, by definition, monopolies in the areas that they serve. As we state therefore the normal forces of competition which operate to regulate prices in a free enterprise society do not operate Therefore, it was the clear intent of the Legislature to regulate monopolies as we and I believe everyone in the utility industry understands that term. It is perfectly clear, also, that there are specialized communications carriers functioning in a competitive environment and therefore we decided that they should not be regulated.

Further, Section 47 of the Act makes it very

clear that we are not going to permit a regulated public utility, such as the telephone company, to discriminate against other persons or companies which sell or lease equipment or perform services in competition with those public utilities or let the public utilities engage in other conduct which might tend to restrict or impair competition. Section 47 is essentially the same as original Section 6.03 of Senate Bill No. 23 which I and Senators Doggett, Gammage and Swartz sponsored. There was never any debate against that section through the legislative proceedings.

It is perfectly clear that Section 47 is consistent with the exemption of specialized carriers in Section 3 of the Act. I think it is pretty common knowledge that regulation is a poor substitute for competition in this country, and it was certainly our intention to preserve existing competition and protect that competition in the future when we adopted the Act.

SECTION I

SOUTHWESTERN BELL CORPORATION

1989 FINANCIAL AND COMPANY DATA

1989 TOTAL OPERATING REVENUES	$8,729,800,000
1989 NET INCOME	$1,092,800,000
1989 TOTAL ASSETS	$21,160,500,000
EMPLOYEES	66,200
NETWORK ACCESS LINES IN SERVICE	11,759,000
MINUTES OF USE (1)	34,295,000,000
LONG DISTANCE MESSAGES (2)	987,940,000

(1) REPRESENTS THE UNITS BY WHICH LONG DISTANCE CARRIERS ARE CHARGED FOR USAGE OF TELCO'S NETWORK

(2) REPRESENTS THE NUMBER OF LONG DISTANCE CALLS HANDLED BY TELCO

SOURCE: 1989 ANNUAL REPORT

DECEMBER 31, 1989 ASSETS

COMPARISON OF SELECTED

U.S. CORPORATIONS

NAME	ASSETS ($MILLIONS)
SOUTHWESTERN BELL	$21,161
WESTINGHOUSE ELECTRIC	20,314
TENNECO	17,381
PROCTER & GAMBLE	16,351
PEPSICO	15,127
MCDONNELL DOUGLAS	13,397
BOEING	13,278
PHILLIPS PETROLEUM	11,256
CATERPILLAR	10,926
HEWLETT-PACKARD	10,075
DEERE	9,146
ANHEUSER-BUSCH	9,026
SUN	8,699
MONSANTO	8,604
BRISTOL-MYERS SQUIBB	8,497
GOODYEAR TIRE & RUBBER	8,460
COCA-COLA	8,283
JOHNSON &JOHNSON	7,919
MOTOROLA	7,686
LOCKHEED	6,792
GENERAL DYNAMICS	6,549
LTV	6,336
REYNOLDS METALS	5,556
HONEYWELL	5,258
LITTON INDUSTRIES	5,257
KIMBERLY-CLARK	4,923

ABBOTT LABORATORIES	4,852
TEXAS INSTRUMENTS	4,804
BETHLEHEM STEEL	4,793
NCR	4,500
RALSTON PURINA	4,382
QUAKER OATS	3,222
GENERAL MILLS	2,888

SOURCE: FORTUNE, APR 23 AND JUNE 4, 1990

1989 OPERATING REVENUES

COMPARISON OF SELECTED

U.S. CORPORATIONS

NAME	OPERATING REVENUES ($MILLIONS)
SOUTHWESTERN BELL	$8,730
MONSANTO	8,681
TIME WARNER	7,642
BORDEN	7,593
HONEYWELL	7,242
DEERE	7,221
RALSTON PURINA	6,712
TEXAS INSTRUMENTS	6,592
LTV	6,362
WHIRLPOOL	6,289
REYNOLDS METALS	6,201
NCR	5,956
GENERAL MILLS	5,798
KIMBERLY-CLARK	5,777
COMMONWEALTH EDISON	5,751
QUAKER OATS	5,724
ABBOTT LABORATORIES	5,454
BETHLEHEM STEEL	5,306
LITTON INDUSTRIES	5,130

SOURCE: FORTUNE, APR 23 AND JUNE 4, 1990

SOUTHWESTERN BELL CORPORATION

- SBC Administrative Services, Inc.
- SBC Corporate Services, Inc.
- SBC Graphics, Inc.
- SBC Technology Resources, Inc.
- Southwestern Bell Capital Corporation
- Southwestern Bell Corporation Washington, Inc.
- SBC Asset Management, Inc.
  - The Golf Club of Oklahoma, Inc.
- Gulf Printing Company*
  - Time Journal Publishing Company
- Southwestern Bell Mobile Systems, Inc.
  - Amarillo SMSA Limited Partnership (GP)
  - St. Louis Cellular System, Inc.
  - St. Joseph SMSA Limited Partnership (GP)
  - Kansas City Cellular System, Inc.
  - Topeka SMSA Limited Partnership (GP)
  - Kansas City SMSA Limited Partnership (GP)
  - Lubbock SMSA Limited Partnership (GP)
  - Dallas Cellular System, Inc.
  - Midland-Odessa SMSA Limited Partnership (GP)
  - Dallas SMSA Limited Partnership (GP)
  - Abilene SMSA Limited Partnership (GP)
  - Oklahoma City SMSA Limited Partnership (GP)
  - Corpus Christi SMSA Limited Partnership (GP)
  - San Antonio SMSA Limited Partnership (GP)
  - McAllen-Edinburg-Mission SMSA Limited Partnership (GP)
  - Wichita SMSA Limited Partnership (GP)
  - Laredo SMSA Limited Partnership (GP)
- Southwestern Bell Telephone Company (MO)
  - Southwestern Bell Telephone Company of Arkansas
  - Arkansas Bell Telephone Company
  - Southwestern Bell Telephone Company (OK)

Oklahoma Bell Telephone Company
Kansas Bell Telephone Company
Missouri Bell Telephone Company
Texas Bell Telephone Company
Texas Bell Communications Company
Southwestern Bell Redevelopment Corporation
Bell Communications Research, Inc.
Southwestern Bell Publications, Inc.
Metromedia Cellular Services, Inc.
Metromedia Paging Services, Inc.
Southwestern Bell Paging Services, Inc.
Southwestern Bell Telecommunications, Inc.
Tsunami Technologies Corporation
Southwestern Bell Telecom (UK) Ltd.

*Not wholly owned

Source: Texas PUC Docket 8585 First RFI JG-10 6-12-89

SOUTHWESTERN BELL PUBLICATIONS, INC.

- Southwestern Bell Media, Inc.
  - New York Yellow Pages, Inc.
  - Cityphone, Inc.
  - Manhattan Telephone Co., Inc.
  - Florida Yellow Pages, Inc.
  - New York Yellow Pages Blue Book, Inc.
  - VNM Foreign Sales Corporation
  - VNM Directory Support Services*
- Southwestern Bell Yellow Pages, Inc.
- Southwestern Bell Publications International, Ltd.
  - Silver Pages of Australia Pty, Ltd.
  - Sypress, Inc.*
    - Directory Technology Pty., Ltd.
    - Canadian Directory Technology, Ltd.*
  - Mast International, Ltd.
    - Australian Directory Services*
  - Automation CI Ltd.*
  - SBP Netherlands B.V.
    - Aurec Inforation and Directory Systems, Ltd.
    - Aurec, Ltd.*
      - Reshet 2000, Ltd.
      - Golden Wheels, Ltd.*
      - Telnuf, Ltd.*
        - Barak Screen Printing, Ltd.
        - Sheat OR Ltd.*
      - Aurec Gold Net, Ltd.
      - Golden Channels, Ltd.
      - This Week in Israel, Ltd.
      - Yellow Pages Publicity 1981, Ltd.
      - Elnet, Ltd.
      - Golden Ages Pages
  - Golden Pages Finance B.V.
    - Golden Pages Publications, Ltd.*

Amdocs, Inc.*
Amdocs Foreign Sales Corporation
Courtnay's Pty., Ltd.*
Credit Services Group Pty., Ltd.
Business Services Corporation Pty., Ltd.
Directories (TAS) Pty., Ltd.
Directories (OLD) Pty., Ltd.
Directories (AUST) Pty., Ltd.
Pink Pages Pty., Ltd.
Mast Advertising and Publishing Inc.
Blake Publishing Company, Inc.
Blake Chart Masters, Inc.
Blake Publishing of Alaska, Inc.

*Not wholly owned

Source: Texas PUC Docket 8585 First RFI JG-10 6-12-89

METROMEDIA PAGING SERVICES, INC. (DE)
- Beep Communication Systems, Inc.
- Birks County Communications, Inc.
- ICS Communications
  - Chalfone Communications
  - Global Paging, Inc.
  - Peak Rentals Incorporated
  - Kidd's Communications, inc.
  - RCS Incorporated
  - Salinas Valley Radio Telephone Company
- Metromedia Paging Services, Inc. (TX)
- Metromedia Telecommunications, Inc. (CA)
- Metromedia Telecommunications, Inc. (DE)
  - Page Alert Corp.
- Metromedia Telecommunications, Inc. (IL)
- Metromedia Telecommunications, Inc. (NH)
  - Comex, Inc.
- Metromedia Telecommunications, Inc. (VA)
  - Beeper, Inc.
  - American Tele Services, Inc. (MD)
    - American Tele Services of Georgia, Inc.
    - American Tele Services of Maryland, Inc.
    - American Tele Services of Washington, Inc.
    - American Radio Telephone Service, Inc. (MD)
    - Contact, Inc.
    - Contact of Washington, Inc.
    - Radio Phone Communications, Inc. (VA)
    - Arts of Virginia, Inc.
    - RP, Inc.
    - American Tele Services, Inc. (VA)
    - FGH, Inc.
    - RDG, Inc.

American Radio Telephone Services, Inc. (VA)
Arts Cellular Systems, Inc.
Mid Band Communications, Inc.
Mobile Phone Paging Radio Corp.
Radio Broadcasting Company
Radio Broadcasting Company of New York, Inc.
Radio Dispatch Co.
Radio Dispatch Company of New York, Inc.
Radiophone Corporation
Empire Paging Corp.
Cellular Telephone Corporation (DE)
Cellular Telephone Corporation (NV)
Radio Telephone Service, Inc.
RAM Broadcasting of Nevada, Inc.
RAM Broadcasting of New Mexico, Inc.
RAM Broadcasting of South Carolina, Inc.
RAM Florida Holdings, Inc.
RBC of Texas, Inc.
Rogers Radio Communications Services, Inc.
Rogers Communications Corp.
Metro Cellular Telecommunications
Metromedia Telecommunications, Inc. (IN)
Gary Cellular Telephone Company*
Cellular Telephones of Florida Corporation
Rogers Radiocall, Inc.
Yankee Telecom Corp.
Yankee Celltel Company
Worcester Telephone Company
Cellular Mobile Systems of the District of Columbia, Inc.
Cellular Mobile Systems of Maryland, Inc.
Post Cellular Telecommunications DC/Maryland, Inc.
Washington/Baltimore Cellular Telephone

Company
Rogers Telephone Answering Service, Inc.
SAM Communications Corporation
Ultracom, Inc.
Answer Phones, Inc.
Autophone of San Antonio, Inc.
Communication, Inc.
IMM, Inc.
Zip Call, Inc.
Budget Beeper Corporation

*Not wholly owned

Source: Texas PUC Docket 8585 First RFI JG-10 6-12-89

Docket No. 8585
Office of Public Utility Counsel
Third Request
Information Request No. 45
07/26/89

45. Provide a description of each subsidiary/affiliate company of SWBC, stating in detail the activities each subsidiary engages in.

Answer: The attached document provides a description of the activities that the principal and secondary subsidiary/affiliate companies of SWBC perform. This includes a description of the activities performed by the corporate staff and the SWBC parent entity.

Responsible Person: John Tyler
Director-Strategic Business
Development Strategic Planning
Southwestern Bell Corporation
One Bell Center 40-Q-Ol
St. Louis, Missouri 63101

ATTACHMENT TO OPUC3-45

Southwestern Bell Corporation

Southwestern Bell Corporation is a family of growing companies offering communications services and products to customers on a regional, national and international basis. The Corporation has seven principal subsidiaries: Southwestern Bell Telephone Company, Southwestern Bell Publications, Inc., Southwestern Bell Telecommunications, Inc., Southwestern Bell Mobile Systems, Inc., Metromedia Paging Services, Inc., SBC Asset Management, Inc., and Gulf Printing Company. In addition, .the Corporation has several smaller subsidiaries as well as a corporate staff.

PRINCIPAL SUBSIDIARIES

Southwestern Bell Telephone Company

Southwestern Bell Telephone Company (SWBT) is a telecommunications common carrier providing services in the states of Arkansas, Kansas, Missouri, Oklahoma and Texas. SWBT provides tariffed telecommunications services in Texas in accordance with and as described by its tariffs for local exchange services, general exchange services, intraLATA private line services, intraLATA long distance telecommunication services, intraLATA wide area telecommunication services, mobile telephone services Bellboy personal signaling services, dataphone digital services, customer specific pricing services and access services. SWBT also provides non-tariffed telecommunication services such as installation and repair of inside wire.

Southwestern Redevelopment Corporation II

Southwestern Redevelopment Corporation II was incorporated in Missouri on August 20, 1981, as Landmark Redevelopment Corporation. The purpose for its creation as stated in the Articles of Incorporation is to acquire, construct, maintain and operate a redevelopment project or projects in accordance with the provisions of the Urban Redevelopment Corporation Law of Missouri. SWBT purchased Landmark on December 9, 1985. On January 10, 1986, the company's name was officially changed to Southwestern Redevelopment Corporation II. Through this subsidiary, SWBT may enjoy the benefits of real property tax abatement on the new computing and data processing center being built in St. Louis.

Bell Communications Research, Inc.

Bell Communications Research, Inc. (Bellcore) was incorporated in Delaware on October 20, 1983, as Central Staff Organization. Effective January 1, 1984, SWBT and the other Regional Bell Operating Companies (RBOCS) acquired ownership of this company. Its name was officially changed to Bell Communications Research, Inc. on February 6, 1984.

Each RBOC, including SWBT, owns one-seventh of Bellcore. Bellcore performs for SWBT services that can be performed most efficiently and economically on a centralized basis. The bulk of these services are of the technical support nature which can be divided into five areas: technology systems support, engineering and operations support, network planning, applied research, and information systems. In addition, there are four departments at Bellcore which provide non-technical

services: Financial and Administrative Services, Market Research and Services, Legal, and Government Affairs.

Southwestern Bell Publications, Inc.

Southwestern Bell Publications (SBP) is the holding company for Southwestern Bell Media, Inc., Southwestern Bell Yellow Pages, Inc., and MAST Advertising & Publishing, Inc. and has no products or operational entities other than those of its subsidiaries. SBP's subsidiaries publish and sell advertising for Yellow Pages and specialty directories. The SBP subsidiaries also produce college directories, maps, and other printed and directory software materials. SBP's other direct subsidiary, Southwestern Bell Publications International, Ltd., is involved in the sale of Yellow Pages advertising for several Australian Telecom Yellow Pages directories. In addition, through a joint venture, SBP is involved in the marketing of a directory computer system that automates sales input procedures and contract processing.

Southwestern Bell Yellow Pages, Inc.

Southwestern Bell Yellow Pages, Inc. (Yellow Pages) sells and produces advertising into yellow pages directories in Missouri, Oklahoma, Arkansas, Kansas, and Texas. It also has a contract with Southwestern Bell Telephone Company to produce its alphabetical white page directories. Sales are organized regionally with Missouri/Kansas and Oklahoma/Arkansas in the North Zone and Houston, Dallas and San Antonio in the Texas Zone. Staff and administrative services are centralized in St. Louis with graphics production in Dallas.

Yellow Pages is a highly regarded directory publisher

with products which are perceived to be the most complete, accurate and the predominant directional advertising medium in any given market. This position has been attained through attention to quality and through creation of systems and skills which assure comprehensive content and universal delivery of the product to every home and business.

AD/VENT Information Services, Inc.

AD/VENT Information Services, Inc. (AVIS) ceased operations in June 1988 and merged into Southwestern Bell Media, Inc. later in the year. Prior to discontinuing operations AVIS sold and produced The Silver Pages which has also been discontinued, a senior citizens discount directory in 93 markets, and published Market Area Directories in New York, Chicago, Washington D.C., and Pinellas County Florida.

Southwestern Bell Media, Inc.

Southwestern Bell Media, Inc. ("Media") is the owner of copyrights for all Publications printed products. Prior to June 1988, Media was the purchasing, marketing and planning arm for Publications. Operational aspects of those functions were transferred to Southwestern Bell Yellow Pages, Inc. along with the shutdown of AVIS.

MAST Advertising & Publishing, Inc.

The primary business of MAST Advertising & Publishing, Inc. ("HAST") is the marketing and publishing of Contel and other independent telephone company directories. Additional lines of business are:

National Yellow Pages Service (NYPS); provides a variety of marketing and media services to large national advertisers so that their complete directory advertising programs can be placed, monitored and billed through one authorized selling representative (ASR).

National Yellow Pages (Publishing); MAST acts as the publishing and billing agent for all national accounts that advertise in MAST and Southwestern Bell directories. ASR's will normally place the advertising for national accounts.

Worldwide Directory Product Sales (WDPS); is the organization that markets publishers' directories nationally and internationally. Marketing of the products/services is done through a mechanized telemarketing operation. WDPS also handles requests for subsequent local directories in the traditional five-state region.

Market Area Directories; The marketing and publishing of Yellow Pages directional advertising to a demographic niche not contiguous to a telephone company. These directories are usually overlaying several telephone company directories in a rural setting or they are carved out of a smaller suburb in a metropolitan market. MAST does not publish market area directories in areas served by Southwestern Bell Telephone Company.

Blake Publishing Company, Inc.

Blake Publishing, Inc. ("Blake") is a wholly-owned subsidiary of HAST Advertising and Publishing, Inc. Blake is a publisher of guides and maps in the United States. Blake also produces sponsored directories (Chamber of Commerce and the Military). The company produces 150 products in twenty-seven

states.

Southwestern Bell Publications International Ltd.

Southwestern Bell Publications International, Ltd. is currently operating internationally in two areas: a joint venture with Volt Information Services, in Australia, and with an ownership position in the Aurec Group of companies. A description of each of these operations follows:

Australia: The joint venture in Australia has two basic operations: Australian Directory Service (ADS), an organization which sells Yellow Pages advertising in the Telecom Australian directories and Volt and Media (VAM), an entity which owns the sales contract and customer data base systems.

Aurec Group: The Aurec Group has several operating entities; AMDOCS, the world leader in the development of directory publishing systems; Golden pages, the dominant Yellow Pages provider in Israel; Goldnet, an information and communication services provider; Maximedia previously referred to as Golden Wheels and Telruf, outdoor and transit advertising providers. Additionally, two new entities have been formed; Ya'aron Ltd., a real estate entity, and Golden Channels, a cable-TV company.

Southwestern Bell Telecommunications, Inc.

Southwestern Bell Telecommunications, Inc. (Telecom) markets telecommunications to both business and residential customers. Telecom offers a full range of products from basic telephones to sophisticated PBX systems. The company has two operating entities:

Business Systems Division (BSD)

BSD markets telecommunications systems to businesses via a premise sales force and a telemarketing department within SWBT's five-state territory. The divisions operations department provides installation and maintenance services for Telecom's customers as well as performs inventory management and distribution functions for the division's product lines.

Freedom Phone Division

The Freedom Phone Division markets a line of proprietary products to consumers and small businesses through a network of independent sales representatives, as well as a network of authorized distributors. Freedom Phone is currently distributed through more than 16 thousand retailers and wholesalers in all 50 states, Puerto Rico and Canada. The Freedom Phone product line includes cordless, basic, designer, feature and home/office telephones, answering machines, key systems and telephone accessories.

Southwestern Bell Telecom (U.K.), Ltd.

Southwestern Bell Telecom U.K. was formed in 1987, as a corporation jointly owned by Telecom and minority partners in the U.K. The company distributes a full range of consumer products through retail channels in Great Britain. The company divides its business into three distribution channels; Retail, Wholesale, and Corporate. The subsidiary sources its products from Freedom Phone's vendors with modifications made for the marketplace in the United Kingdom.

Tsunami Technologies Corporation

Tsunami Technologies Corporation is now formally known as SB Telecom California Inc. The operations and assets of the company have.been sold and therefore the company is inactive.

Southwestern Bell Mobile Systems, Inc.

Southwestern Bell Mobile Systems, Inc. (SBMS) provides high quality, competitively priced mobile communication services and new radio-related services. SBMS provides cellular mobile radio telecommunications services to over 300,000 customers in 24 markets throughout the United States, including four of the top 10 nationwide and six of the top 15. SBMS is also engaged in the sale and lease of cellular mobile customer premises equipment. It also engages in providing consulting services to other cellular service operators.

Metromedia Paging Services, Inc.

Metromedia Paging Services, Inc. (MPS) is a Radio Common Carrier (RCC), marketing personal communications services in most major metropolitan areas throughout the United States. MPS is the nations largest provider of paging service. With 38 office locations and approximately 2,000 licensed transmitters, MPS has the ability to provide paging services to approximately 444 of the nations population.

MPS offers a complete line of paging, or messaging, products from simple tone products with local coverage, to the alphanumeric display with nationwide coverage. In addition to

paging service, MPS also markets the radio receiving device, or pager, needed by the customer to utilize the service. Customers have the option of purchasing or leasing the pagers.

MPS also provides certain mobile telephone services. The services include Improved Mobile Telephone Service (IMTS), Manual Mobile Telephone Service (MMTS and Specialized Mobile Radio (SMR). IMTS and MMTS are essentially the car telephones offered prior to the introduction of cellular technology.

SMR service is primarily a dispatch radio service principally used by fleet operations in the service sector of the economy. MPS operates SMR systems in the Chicago, Philadelphia, , Texas and California markets.

Gulf Printing Company

Gulf Printing Company (Gulf) is a well established printer with a reputation for high quality products and services.

Gulf prints telephone directories for various subsidiaries of Southwestern Bell Publications, Inc. Gulf similarly produces printed materials for a divergent group of commercial accounts.

Times Journal Publishing Company

Times Journal Publishing Company (Times Journal) is a subsidiary of Gulf Printing Company and also provides commercial printing services. Times Journal has both a commercial plant and a directory plant. Times Journal prints telephone directories for MAST Advertising & Publishing,

Inc. as well as other directory publishers nationwide. In addition, Times Journal prints a variety of other material such as, catalogs, direct mail packages, and miscellaneous material for general commercial accounts.

SBC Asset Management, Inc.

SBC Asset Management, Inc. (AMI) is a full service real estate and investment/development company. AMI consists of two lines of business: commercial real estate services and investment/development.

Within the commercial real estate services, AMI offers commercial brokerage services and handles SBC's home relocation plans, servicing employees relocating within the continental United States. Additional services include property management and design services consisting of interior design, space planning, and tenant build-out management services.

Within the investment/development, AMI actively evaluates and invests in real estate development opportunities.

The Golf Club of Oklahoma

The Golf Club of Oklahoma, Inc. is a subsidiary of SBC Asset Management, Inc. It is a "private members" only club located in Broken Arrow, Oklahoma. The Golf Club, which is situated on 525 acres of land is composed of, an 18-hole private golf course, four cottages, a 30-acre practice facility, and approximately 100 acres of undeveloped land.

OTHER SUBSIDIARIES

SBC Administrative Services, Inc.

SBC Administrative Services, Inc. is an administrative subsidiary whose purpose is to provide general human resource services including, but not limited to, benefit development and sales training to the parent company as well as the national subsidiaries.

Southwestern Bell Capital Corporation

Southwestern Bell Capital corporation ("Capital Corporation") is engaged principally in issuing debt securities and lending the proceeds to SBC and to certain subsidiaries of SBC other than Southwestern Bell Telephone Company. Capital Corporation currently lends monies to SBC Asset Management, Inc.; Southwestern Bell Telecommunications, Inc.; Gulf Printing company; Southwestern Bell Publications, Inc.; Southwestern Bell Mobile Systems, Inc.; and Metromedia Paging services, Inc.

SBC Corporate Services, Inc.

SBC Corporate Services, Inc. provides air transportation for the executives of the parent company and its subsidiaries.

Southwestern Bell Corporation - Washington, Inc.

Southwestern Bell Corporation - Washington, Inc.

represents the interests of Southwestern Bell Corporation and each of its subsidiaries before the United States Congress, federal departments and administrative agencies (e.g., Department of Justice, Federal Communications Commission, Internal Revenue Service), industry trade groups and the U.S. District Court of the District of Columbia. This includes monitoring federal, legal, regulatory and political activity as well as promoting and presenting corporate positions to those pertinent legislative and regulatory bodies.

SBC Technology Resources, Inc.

SBC Technology Resources, Inc. (TRI) provides technology, direction and support for SBC and SBC's subsidiaries in order to position SBC as the quality provider of leading edge communications products-and services at competitive prices. Research is focused on specific technologies which are considered strategic to the support of SBC's markets. TRI does not perform product-specific design and development for equipment, but rather performs research and develops generic requirements that can be provided to vendors to design and develop specific products. Core activities of TRI include: applications research (taking known scientific discoveries and determining if and how they can be utilized in the telecommunications environment) as well as specialized research into basic scientific principles; preparing general specifications for products; testing and evaluating manufacturer's designs and products to determine if they meet SBC requirements; and, writing applications software for computers with processing systems that have been designed to be user-programmed.

St. Louis Health Center, Incorporated

The St. Louis Health Center, Incorporated ("Health Center") is a health care provider operating in downtown St. Louis, Missouri, offering the public a full range of general at-patient medical and dental diagnostic and treatment services.

Supreme Court, U.S.
FILED
MAR 4 1992
OFFICE OF THE CLERK

(3)

NO. 91-1269

In The

Supreme Court Of The United States

OCTOBER TERM, 1991

U.S. METROLINE SERVICES, INC.
Petitioner,

vs

SOUTHWESTERN BELL TELEPHONE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

CAROL L. TACKER
COUNSEL OF RECORD
SOUTHWESTERN BELL TELEPHONE COMPANY
One Bell Plaza, Room 2900
208 South Akard
Dallas, Texas 75202
(214) 464-2219

Attorney for Respondent

RESPONSE TO ISSUES PRESENTED

1. The Fifth Circuit did not err in affirming that Respondent's actions were immune from liability pursuant to the state action doctrine articulated in *Parker v. Brown.*

2. The decision below granted limited immunity and that holding is appropriate under prevailing precedents applied to the regulatory structure in Texas.

3. There is no conflict between the decision below and the decisions of other Courts of Appeal and of this Court.

TABLE OF CONTENTS

Page

RESPONSE TO QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

SUMMARY OF ARGUMENT 1

STATEMENT OF THE CASE 3

ARGUMENT 7

1. The Fifth Circuit Did Not Err In Affirming That Respondent's Actions Were Immune From Liability Pursuant To The State Action Doctrine Articulated In *Parker v. Brown.* 8

2. The Decision Below Granted Limited Immunity And That Holding Is Appropriate Under Prevailing Precedents Applied To The Regulatory Structure In Texas. 12

3. There Is No Conflict Between The Decision Below And The Decisions Of This Court And Other Courts Of Appeal. 26

CONCLUSION 29

TABLE OF AUTHORITIES CITED

Page

United States Supreme Court decisions:

324 Liquor Corp. v. Duffy,
479 U.S. 335 (1987) 24

California Retail Dealer's Ass'n v. Midcal Aluminum, Inc.,
445 U.S. 97 (1980) 2, 8, 15, 16, 17, 20, 22, 27

Cantor v. Detroit Edison Co.,
428 U.S. 579 (1976) 2, 24, 26, 27

Hallie v. Eau Claire,
471 U.S. 34 (1985) 24

Parker v. Brown,
317 U.S. 341 (1943) 1, 3, 6, 7, 8, 9, 13, 15, 16, 20

Patrick v. Burget,
486 U.S. 94 (1988) 24

Southern Motor Carriers Rate Conference, Inc. v. United States,
471 U.S. 48 (1985) 8, 15, 16, 19, 20, 22, 27

University of Texas v. Camenisch,
451 U.S. 390 (1981) 12

United States Courts of Appeal decisions:

Alabama Power Co. v. Alabama Electric Cooperative, Inc.,
394 F.2d 672 (5th Cir. 1968), *cert. denied*,
393 U.S. 488 (1968) 16

Benton, Benton & Benton v. Louisiana Public Facilities Authority,
897 F.2d 198 (5th Cir. 1990), *cert. denied*,
111 S. Ct. 1619 (1991) 27

TABLE OF AUTHORITIES CITED (Continued)

Page

Bd. of Trade v. Commodity Futures Trading Comm'n., 605 F.2d 1016 (7th Cir. 1979), *cert. denied*, 466 U.S. 928 (1980) 11

Carter v. American Telephone & Telegraph Co., 365 F.2d 486 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967) 18

City of Angoon v. Hodel, 803 F.2d 1016 (9th Cir. 1986), *cert. denied*, 484 U.S. 870 (1987) 11

DFW Metro Lines Services v. Southwestern Bell Telephone Co., 901 F.2d 1267 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 519 (1990) 6, 18

Essential Communications Systems, Inc. v. American Telephone & Telegraph Co., 610 F.2d 1114 (3rd Cir. 1979) 27, 28

Gas Light Co. of Columbus v. Georgia Power Co., 440 F.2d 1135 (9th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972) 16

Jeffrey v. Southwestern Bell Telephone Co., 518 F.2d 1129 (5th Cir. 1975) 16

Kennedy v. City of Cleveland, 797 F.2d 297 (6th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987) 11

TABLE OF AUTHORITIES CITED (Continued)

Page

Lease Lights, Inc. v. Public Serv. Co. of Okla.,
849 F.2d 1330 (10th Cir. 1983), *cert. denied*,
488 U.S. 1019 (1989) 10, 11, 27

Liffiton v. Keuker,
850 F.2d 73 (2nd Cir. 1988) 10

McQueen v. Bullock,
907 F.2d 1544 (5th Cir. 1990), *cert. denied*,
111 S.Ct. 1308 (1991) 9

Milgard Tempering, Inc. v. Selas Corp. of America,
902 F.2d 703 (9th Cir. 1990) 10

Sakamoto v. Duty Free Shoppers Ltd.,
764 F.2d 1285 (9th Cir. 1985), *cert. denied*,
475 U.S. 1081 (1986) 10, 24

Scott v. Kuhlmann,
746 F.2d 1377 (9th Cir. 1984) 9

Sierra Club v. U.S. Army Corps of Engineers,
771 F.2d 409 (8th Cir. 1985) 12

Turf Paradise, Inc. v. Arizona Downs,
670 F.2d 813 (9th Cir. 1982), *cert. denied*,
456 U.S. 1011 (1982) 23

Woolen v. Surtran Taxicabs, Inc.,
801 F.2d 159 (5th Cir. 1986), *cert. denied*,
480 U.S. 931 (1987) 15

United States District Court decisions:

Davis v. Southern Bell,
755 F. Supp. 1532 (S.D. Fla. 1991) 21

TABLE OF AUTHORITIES CITED (Continued)

Page

Monarch Entertainment Bureau, Inc. v. New Jersey Highway Authority, 715 F. Supp. 1290 (D.N.J. 1989), aff'd. without op., 893 F.2d 1331 (1989) 24

Sonitrol v. American Telephone & Telegraph Co., 629 F. Supp. 1089 (D.D.C. 1986) 15, 16, 20

Texas Supreme Court and Courts of Appeals decisions:

Public Utility Commission of Texas v. AT&T Communications, Inc., 777 S.W. 2d 363, (Tex. 1989) 19, 20, 23, 28

Amtel Communications, Inc. v. PUC, 687 S.W.2d 95 (Tex. App. 3rd Dist. 1985, no writ) 19, 23, 28

Texas Alarm & Signal Assoc. v. PUC, 603 S.W. 2d 766 (Tex. App. — Austin 1985, no writ) 19, 23

Federal and State Regulatory Agency decisions:

Texas PUC Docket 5113, Conclusions of Law 14

Texas PUC Docket 5827, Final Order, November 21, 1984 13

Constitution, Statutes and Rules:

Texas Public Utility Regulatory Act ("PURA"), Tex. Rev. Civ. Stat. art. 1446(c) 2, 8, 14, 17

PURA §2 ..... 13, 15, 17, 20, 26

TABLE OF AUTHORITIES CITED (Continued)

Page

PURA §3 (d), 3(3) 17, 20
PURA §16(a) 18, 19, 25
PURA §18 ..... 18, 23
PURA §18(a) 17, 21
PURA §18(b) 17
PURA §27 23
PURA §28 23
PURA §31 18
PURA §32 18
PURA §35 18
PURA §37 18
PURA §38 ..... 18, 20, 28
PURA §40 18
PURA §42 ..... 18, 26
PURA §43(f) 18
PURA §45 ..... 4, 19, 20, 28
PURA §46 ..... 15, 19, 20
PURA §47 ..... 19, 20, 21, 28
PURA §62 23
PURA §69 ..... 19, 23, 28
PURA §71 ..... 19, 24, 25
PURA §72 19

TABLE OF AUTHORITIES CITED (Continued)

	Page
PURA §73	19
PURA §74	19
PURA §75	19
PURA §76	19
PURA §77	19
PURA §83	15
PURA §83(a)	18
PURA §84	18
PUC Substantive Rules, Sec. 23.26	26
Fed. R. Civ. Pro. 12(b)(6)	7, 9, 11

NO. 91-1269

In The

Supreme Court Of The United States

OCTOBER TERM, 1991

U.S. METROLINE SERVICES, INC.
Petitioner,

vs

SOUTHWESTERN BELL TELEPHONE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

A Writ of Certiorari is not appropriate in this case. The United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") did not err in holding Southwestern Bell was immune from antitrust liability under the circumstances of this case, relying upon *Parker v. Brown*, 317 U.S. 341 (1943). The Fifth Circuit determined immunity was appropriate in the first appeal wherein Petitioner sought a reversal of the denial of injunctive relief. The issue of immunity was fully briefed by both parties prior to that decision.

When the same liability was reasserted by Petitioner following the lower court's grant of Southwestern Bell's 12(b)(6) Motion to Dismiss, the Fifth Circuit correctly applied law of the case on the immunity issue to that second appeal. As the Fifth Circuit held in the first appeal, Southwestern Bell clearly meets the two-prong test set out in *California Retail Dealer's Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Texas has a pervasive regulatory system governing Southwestern Bell's actions as a regulated utility, and the state actively supervises Southwestern Bell's conduct under the auspices of its agency, The Public Utility Commission of Texas ("Commission").

The services at issue in this dispute are the network connections that are the focus of regulation in Texas, not a minor side business on the fringe of regulation as was the light bulb exchange program in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976).

Southwestern Bell sought to terminate Petitioner's misuse and resale of its local exchange services to provide Petitioner's interexchange service because both the use and the resale violate applicable tariffs approved by the Public Utility Commission of Texas. Interexchange carriers like Petitioner are required to order services from Southwestern Bell's Access Service Tariff, and pay a higher rate, as approved by the Commission following contested hearings and as ultimately approved by the Texas Supreme Court upon review. There is no resale prohibition in the Access Service Tariff. Ordering from the Access Service Tariff was Petitioner's alternative to termination.

Allowing Petitioner to misuse local exchange services at a low rate while enforcing the prohibition against other interexchange carriers creates an unreasonable discrimination prohibited by the Public Utility Regulatory Act,

Tex. Rev. Civ. Stat. Ann. art. 1446(c) (Vernon's Supp. 1989) ("PURA"). Given the extensive regulation of Southwestern Bell's provision of the services at issue in this dispute, *Parker v. Brown* immunity is appropriate and the Writ of Certiorari should be denied.

STATEMENT OF THE CASE

Southwestern Bell Telephone Company[1] ("Southwestern Bell") provides telecommunications services in the state of Texas pursuant to a certificate of convenience and necessity issued by the Public Utility Commission of Texas ("Commission").

U.S. Metroline Services, Inc. ("USM") and Southwestern Bell each offer a form of flat-rate calling between the Dallas and Ft. Worth exchanges. Southwestern Bell's tariffed service is called "Extended Metropolitan Service" or "EMS". For an additional monthly charge for the optional EMS service, Southwestern Bell customers can enjoy the expanded calling scope of the two exchanges without incurring usage-sensitive long distance charges.

The EMS service offered by Southwestern Bell which provides for the calling scope of Dallas and Ft. Worth is available only to customers who reside in the area abutting the two exchanges. If residents of Dallas or Ft. Worth are not located in this discrete area but want EMS service from Southwestern Bell, they must, (pursuant to tariff), pay a mileage fee to connect their premises with the nearest

---

[1]Please see Appendix of Petitioner, Section I for the listing of parent companies and subsidiaries of Southwestern Bell pursuant to Rule 29.1.

Southwestern Bell central office which provides EMS service, in addition to the Commission-approved EMS rate.[2]

USM offers a service at a flat-rate to residents of Dallas and Ft. Worth in lieu of their customers paying long distance charges. Based on the way USM has arranged their network, their customers do not incur a mileage charge. Southwestern Bell complains of the improper use USM is making of Southwestern Bell's tarriffed services in order to provide its substitute for long distance service, which they refer to as "metro service".

Southwestern Bell confirmed the use being made of its services when it conducted an audit of USM in late 1988-1989. The audit was a routine procedure by the Tariff Adherence Group ("TAG") who were charged with ensuring that Southwestern Bell's services were being used in conformance with the tariffs under which it operates. This is a crucial determination since Southwestern Bell cannot, under PURA Sec. 45, discriminate in the provision of its services. Southwestern Bell must, therefore, ensure its customers are not providing a service through the inappropriate use of lower-rated Southwestern Bell services, while other customers provide a similar service through the appropriate use of higher-rated Southwestern Bell services.

As a result of the audit, Southwestern Bell discovered USM was "reselling" local exchange services it procured from Southwestern Bell in order to provide its outbound interexchange service, in violation of the prohibition against

---

[2]The Commission approved Southwestern Bell's tariffs under which it provides these services as an optional form of local exchange service; the Commission has never recognized "a third category of service" as characterized by USM on page 2 of its petition.

resale contained in Southwestern Bell's General Exchange Tariff.[3] Interexchange services are available to interexchange carriers like USM and must be procured from the Access Service Tariff where there is no prohibition against resale. Because the tariffed Access Service rates are higher than the tariffed rates of local exchange services, and because services provided under the Access Service tariff can be resold, TAG audits were conducted to ensure services were procured from the appropriate tariffs. On March 9, 1989, Southwestern Bell wrote a letter to USM informing it of its misuse of Southwestern Bell's services. After several fruitless discussions, Southwestern Bell ultimately sent USM a termination notice, stating it would terminate service on July 11, 1989. Southwestern Bell would have continued to provide service if USM secured its services from the Access Service tariff, as appropriate for every interexchange carrier.

In order to understand how USM instituted its service, it is necessary to go back to 1982 when an entity known as DFW Communications procured services from Southwestern Bell by way of Greg Cunningham, it founder. (Appendix, 2c) DFW Communications was a licensed radio common carrier (RCC) which entitled it to certain circuits limited by contract to RCC's and to RCC-DID numbers and trunk terminations under Southwestern Bell's applicable tariffs. *(Id.)* These RCC services are provided at rates lower than even "regular" business local exchange services, are of limited availability and are to be used *only* in providing paging and two-way mobile service. DFW Communications was in the paging business.

---

[3]The General Exchange Tariff containing the resale prohibition applies to all local exchange customers. There is no "resale prohibition tariff" as stated on page 3 of the Petition.

Mr. Cunningham became the technical adviser, manager and developer of DFW Metro Line Services, a partnership, while still operating DFW Communications. While this new entity (now incorporated and known as USM) provided the metro-like service, Southwestern Bell originally believed the services were being used to provide paging services as an RCC. *(Id.)* Mr. Cunningham continued to place orders for additional Southwestern Bell services for what Southwestern Bell believed to be DFW Communications, and the accounts were originally billed in the name of DFW Communications.

In fact, DFW Metro Line (now USM) was never an RCC, never provided paging services and was, therefore, *never* entitled to the use of RCC services to provide its inbound calling. The misuse of these inbound services was additional grounds for termination. The audit confirmed this misuse and that USM was providing an interexchange service via resale of local exchange service and thus the termination process was initiated.

The Commission determines the appropriate rates to be charged by a utility based in part upon the use to be made of that service. (e.g., "business" vs. "residential" rates). This use also determines whether the service being provided is within the parameters found appropriate by the Commission pursuant to its approval of Southwestern Bell's tariffs.

Petitioner filed suit in federal district court seeking injunctive relief, claiming the impending termination was a violation of the antitrust laws. Petitioner's injunctive relief was denied. Petitioner appealed that denial and the decision by the lower court was affirmed by the United States Court of Appeals for the Fifth Circuit, *DFW Metroline, Inc. v. Southwestern Bell Telephone Co.*, 901 F.2d 1267, 1269 fn.6 (5th Cir. 1990), cert. den. ____ U.S. ____,

111 S.Ct. 519 (1990), holding *inter alia* that Southwestern Bell was immune from the antitrust liability alleged by DFW pursuant to the "state action" doctrine enunciated in *Parker v. Brown,* 317 U.S. 341 (1943).

Subsequently, the district court granted Southwestern Bell's Fed. R. Civ. Pro. 12(b) (6) Motion to Dismiss relying in part upon the Fifth Circuit's holding cited above. Petitioner appealed, and again, the Fifth Circuit affirmed the lower court in a *per curiam* opinion. In so holding, the Fifth Circuit acknowledged that "Bell is immune from the antitrust liability alleged" as established by the law of this case. The Court determined: "Since the same liability is now reasserted, Bell is immune from liability here". (Appendix, Section A, p. 4-a). This petition followed.

ARGUMENT

The Fifth Circuit did not err in applying *Parker v. Brown* immunity to the actions of the Respondent in its initial opinion in this case, and further appeal of that initial decision was exhausted when this court denied certiorari in 1990.

Petitioner later asserted the same liability against Respondent even though the Fifth Circuit had already held Respondent's actions were immune from liability; therefore, the application of "law of the case" to the immunity issue on the second appeal was appropriate.

Petitioner's argument concerning the relative size of the parties, not only incorporates information that is outside the record of this case, but is also inapposite to the issues presented for review. Whether Respondent's actions at issue in this case are immune from antitrust liability due to the fact it acted pursuant to a pervasive regulatory scheme

effectuated by the State of Texas is not predicated upon the perceived financial strength of the parties.

The Fifth Circuit did not grant Respondent a limitless cloak of immunity, as Petitioner seems to allude. Rather, the Court recognized Respondent was acting in these circumstances as a regulated utility, pursuant to the auspices of a pervasive statutory regulatory scheme in Texas. The statutory framework is set forth in the Public Utility Regulatory Act ("PURA"), Tex. Rev. Civ. Stat. Ann. art. 1446(c) (Vernon Supp. 1989), under the purview of the Public Utility Commission of Texas.

1. THE FIFTH CIRCUIT DID NOT ERR IN AFFIRMING RESPONDENT'S ACTIONS WERE IMMUNE FROM LIABILITY PURSUANT TO THE STATE ACTION DOCTRINE ARTICULATED IN *PARKER V. BROWN.*

Petitioner incorrectly characterizes the Fifth Circuit's holding in the first appeal that Respondent's actions are immune from liability as "dicta". The court specifically stated:

> As an *additional basis for our holding,* we *find* that Southwestern Bell is immune from the antitrust liability alleged in DFW's complaint under the "state action" doctrine enunciated in *Parker v. Brown,* 317 U.S. 341, 63 S. Ct. 307, 87 L.Ed. 315 (1943), as applied to private state-regulated ratemaking by *Southern Motor Carriers Rate Conference v. United States,* 471 U.S. 48, 105 S. Ct. 1721, 85 L.Ed. 2d 36 (1985). Southwestern Bell clearly meets the two-prong test set out in *California Retail Dealer's Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S. Ct. 937, 63 L.Ed. 2d 233 (1980). There is no, therefore, likelihood of success on the merits in the instant case. (emphasis added)

By focusing on the "law of the case" language in the Fifth Circuit's decision in the appeal, Petitioner ignores the fact that the Court applied "law of the case" *because* the same liability was being asserted against the *same* party, therefore, the *same* immunity applied. Under any standard of review, this holding was appropriate. Petitioner's case against Respondent was barred *ab initio* due to *Parker v. Brown* immunity, as apparent on the face of the complaint. Therefore, at every stage of the proceedings it was appropriate for the lower court and the Fifth Circuit, both, to uphold that bar.

There is no conflict between the Fifth Circuit's decision in this case and the cases referenced by Petitioner on pages 7-9 of its Petition. Petitioner fails to distinguish between a mere procedural holding in a preliminary proceeding, such as a general failure to show irreparable injury entitling a party to immediate injunctive relief, from a fatal flaw in a cause of action that nullifies the party's ability to proceed on the merits, such as immunity. Immunity is one of the limited number of defenses upon which dismissal by 12(b) (6) motion is appropriate. See *McQueen v. Bullock*, 907 F.2d 1544, 1550-51 (5th Cir. 1990), *cert. den.* ____ U.S. ____, 111 S.Ct. 1308 (1991).

To apply Petitioner's reasoning to a different set of facts would support, for example, proceeding to the merits on a claim absolutely barred by the applicable statute of limitations after that bar was first recognized in a decision on a preliminary matter. Such a result is anathematic to judicial economy and is not mandated by the law.

Petitioner cites *Scott v. Kuhlmann*, 746 F.2d 1377 (9th Cir. 1984) for the proposition that an affirmative defense (such as immunity) may not ordinarily be raised by a motion to

dismiss. In that case, *res judicata* was the affirmative defense asserted in a case dismissed by the trial court. The Ninth Circuit held that when the defense raises no disputed issues of fact, raising the defense in a motion to dismiss is appropriate. (*Id.* at 1378). In a later case, the same circuit upheld a claim of immunity by Guam in a dismissal of the action by summary judgment. *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285 (9th Cir. 1985), *cert. den.*, 475 U.S. 1081 (1986).

Petitioner asserts the Fifth Circuit's decision regarding "law of the case" conflicts with *Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703 (9th Cir. 1990), when in fact that case supports the Fifth Circuit's decision. In *Milgard*, law of the case was inapplicable because neither the lower court nor the Ninth Circuit in the first appeal discussed the issue of attorney's fees. Therefore, law of the case did not apply in the second appeal as to the attorney fee issue. The *Milgard* opinion discussed law of the case application, noting:

> For the doctrine to apply the issue in question must have been "decided explicitly or by necessary implication in [the] previous disposition. (*Id.* at page 715, cites omitted).

In the present case, the immunity issue was thoroughly briefed and explicitly determined at the first appeal.

There is also no conflict with *Liffton v. Keuker*, 850 F.2d 73 (2d Cir. 1988), cited by Petitioner. In that civil rights case, the sovereign immunity defense was called into question. The Second Circuit upheld the dismissal of claims against the state, Supreme Court Justice Kasler, one Assistant Deputy Attorney General, the county and the Internal Revenue Service. As to another Assistant Deputy Attorney

General, the court found the complaint raised allegations entitling him only to qualified immunity, which does not ordinarily support a 12(b) (6) dismissal. Nothing in *Liffton* conflicts with a decision by a court construing a complaint that does *not* raise an issue that cannot be overcome by the defense of immunity.

The opinion in *Kennedy v. City of Cleveland*, 797 F.2d 297 (6th Cir. 1986), *cert. den.*, 479 U.S. 1103 (1986) does not support the argument for which it is cited by Petitioner, and in fact does not even *mention* the tests applicable to a preliminary injunction and Rule 12(b) (6) motion to dismiss.

On page 9 of its Petition, Petitioner confuses the fact that various courts have held the stay of a preliminary injunction does not automatically establish the law of the case, with the Fifth Circuit's decision in the present case concerning the applicability of the immunity defense to the circumstances. In *The Board of Trade of the City of Chicago v. Commodity Futures Trading Commission*, 605 F.2d 1016 (7th Cir. 1979), *cert. den.*, 466 U.S. 928 (1980), the court would not apply law of the case when its only action in the first appeal was to deny a motion to stay that was raised in an emergency motion for a stay pending appeal.

Similarly, in *City of Angoon v. Hodel*, 803 F.2d 1016 (9th Cir. 1986), *cert. den.* 484 U.S. 870 (1987), the Ninth Circuit only stated the "general rule" regarding preliminary injunction not constituting law of the case, then held its "independent consideration" of the issues led it to approve the conclusions in the first appeal. There is nothing in the record of this case to suggest the Fifth Circuit did not engage in an "independent consideration" in finding Respondent was immune from a reassertion of the same liability, while applying law of the case.

Finally, *Sierra Club v. U.S. Army Corp of Engineers,* 771 F.2d 409 (8th Cir. 1985) stands for the proposition that findings of fact and conclusions of law made by a court in granting or denying a preliminary injunction are not binding at the trial on the merits. This holding is inapposite to the issues in the present case.

Neither is there conflict with this Court's opinion in *University of Texas v. Camenisch,* 451 U.S. 390 (1981). That case involved the question of whether a preliminary injunction should have been moot since the terms of the injunction have been fully carried out when the university hired an interpreter for a deaf student. This Court found the injunction question was moot, but the question of whether the university must pay for the interpreter remained for trial on the merits. There is no parallel with the present case in *Camenisch.* After the Fifth Circuit affirmed the denial of preliminary relief, the case went back to the trial court. The Petitioner's complaint was disposed of by the District Court, without trial, by granting Respondent's Motion to Dismiss. That dismissal was affirmed in the second appeal. Therefore, no unresolved issue remained to be determined as in *Camenisch.* There is also no issue of mootness in the present dispute.

2. THE DECISION BELOW GRANTED LIMITED IMMUNITY AND THAT HOLDING IS APPROPRIATE UNDER PREVAILING PRECEDENTS APPLIED TO THE REGULATORY STRUCTURE IN TEXAS.

There is no dispute that the Sherman Act is not subject to the "permission or approval" of the state of Texas, as asserted by Petitioner on page 10 of its petition. What Petitioner fails to recognize is that this Court has long ago

resolved any conflict between the states and the federal antitrust laws in *Parker v. Brown*, 317 U.S. 341 (1943), holding:

> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.

While Petitioner paraphrases the purpose clause of PURA, Section 2, on page 10 of its Petition, the language of that clause is unequivocal when read in context and in its entirety:

> This Act is enacted to protect the Public interest inherent in the rates and services of public utilities. The legislature finds that public utilities are by definition monopolies in the areas they serve; that therefore the normal forces of competition which operate to regulate prices in the free enterprise society do not operate; and that therefore utility rates, operations and services are regulated by public agencies, *with the objective that such regulation shall operate as a substitute for such competition.* The purpose of this Act is to establish a comprehensive regulatory system which is adequate to the task of regulating public utilities as defined by this Act, to assure rates, operations, and services which are just and reasonable to the consumers and to the utilities. (emphasis added). (Appendix at 55h)

Petitioner misapplies the quote in footnote 6 of its Petition to the facts in this case. In that quote, the Commission was referring to *new technologies.* There are no new technologies at issue in this case. What is at issue is Petitioner's misuse of fundamental, basic local exchange services secured from Respondent in order to provide an interexchange flat rate calling scheme that it believes to be competitive with a longstanding flat-rate calling plan that Respondent has offered in Texas since the late sixties, well

before PURA was passed in 1976, and the Commission was established.

There is no "giving way" to technology in the present scenario. In an even earlier order, Docket 5113, in conclusion of law number 31, the Commission found:

> The Commission can reasonably elect to implement a plan which preserves universal service in a manner which causes the least customer impact and can reasonably conclude that preserving universal service for several million local ratepayers must take priority over the protection of the competitive enterprises of the relatively few interexchange customers.

The present dispute is not a refusal by Respondent to permit Petitioner to interconnect with Respondent's services. This dispute can be reduced to an unwillingness of Petitioner to pay the appropriate tariffed rate for the use of Southwestern Bell's services necessary for Petitioner to provide its own service. Petitioner wants to rewrite Southwestern Bell's tariffs to accommodate its idea of how it wants to use Southwestern Bell's services, regardless of how other providers are limited in use, and to decide unilaterally what rate it wants to pay for that use.

Southwestern Bell's actions in this factual circumstance are protected by the state action doctrine, because the enforcement of its Commission-approved tariffs is conduct that is clearly articulated and affirmatively expressed as state policy, under PURA, and the state actively supervises such conduct through the Commission, an agency of the state created by the Texas Legislature.

Southwestern Bell's obligation to enforce its tariffs as they apply to Petitioner or any other similarly situated customer and to charge the appropriate tariffed rate for a

service is clearly aritculated and affirmatively expressed as state policy, (PURA, §§2, 46), and the state actively supervises such conduct so as to remove it from scrutiny under the antitrust laws. (PURA §83). Thus, the Fifth Circuit held that Southwestern Bell's actions in this case are exempt from the antitrust laws under the state action doctrine. The United States Supreme Court's landmark decision applying *Parker v. Brown*, 317 U.S. 341 (1943) to private collective ratemaking activity leaves no question that this petition must be denied because of the state action doctrine. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985); see also *Woolen v. Surtran Taxicabs, Inc.*, 801 F.2d 159, 163-64 (5th Cir. 1986), *cert. den.*, 480 U.S. 931 (1987).

This Court's two-pronged test for determining whether state regulation of private parties is shielded from the federal antitrust laws provides: (1) the challenged restraint must be clearly articulated and affirmatively expressed as state policy; (2) the state must actively supervise any anticompetitive conduct. *Southern Motor Carriers*, 471 U.S. at 57; *Midcal*, 445 U.S. at 97; *see also Woolen v. Surtran Taxicabs, Inc.*, 801 F.2d at 163-64. This court in *Southern Motor Carriers* rejected the notion that the state had to *compel* the questioned anticompetitive conduct in order to have clearly articulated and affirmatively expressed its policy. *Southern Motor Carriers*, 471 U.S. at 60. This Court held that "[T]he federal antitrust laws do not forbid the States to adopt policies that permit, but do not compel, anticompetitive conduct by *regulated* private parties." *Id.* at 60 (emphasis in original); *see also Sonitrol v. American Telephone & Telegraph Co.*, 629 F. Supp. 1089, 1094-95 (D.D.C. 1986). This court in *Southern Motor Carriers* also held:

> A private party acting pursuant to an anticompetitive regulatory program need not "point to a specific,

> detailed legislative authorization" for its challenged conduct. [citation omitted] *As long as the state as sovereign clearly intends to displace competition in a particular field with a regulatory structure,* the first prong of the *Midcal* test is satisfied.

Southern Motor Carriers, 471 U.S. at 63 (emphasis added); *see also Sonitrol,* 629 F. Supp. at 1094-95.

Even before *Southern Motor Carriers,* the Fifth Circuit confronted the question of application of the state action defense to antitrust claims very similar to those in this case. In *Jeffrey v. Southwestern Bell,* 518 F.2d 1129 (5th Cir. 1975), residential telephone subscribers in Dallas, Texas brought an action to challenge certain allegedly anticompetitive practices of Southwestern Bell. The Fifth Circuit held that there is no function more particularly "sovereign" than the implementation of rates and regulations on a public utility. (*Id* at 1133). Thus, activities commanded by governmental bodies are exempt from antitrust attack. *(Id.)* (citing *Alabama Power Co. v. Alabama Electric Cooperative, Inc.,* 394 F.2d 672 (5th Cir. 1968), *cert. denied,* 393 U.S. 488 (1968). The Court also stated in *Gas Light Co. of Columbus v. Georgia Power Co.,* 440 F.2d 1135, 1140 (9th Cir. 1971) *cert. den.,* 404 U.S. 1062 (1972) that the *Parker* exclusion applies to the rates and practices of public utilities enjoying monopoly status under state policy when their rates and practices are subject to meaningful regulation and supervision by the state so that they are the result of the considered judgment of the state regulatory authority. Regulation by a governmental body of the rates and practices of a public utility is a classic example of the *Parker v. Brown* exemption. (*Jeffrey,* 518 F.2d at 1134).

Petitioner's complaint is that Southwestern Bell is attempting to enforce its tariff rates against Petitioner for

use of Southwestern Bell's services in its metro-like business. USM contends that such tariff rates are self-serving and exclude competition by attacking the rate structure set out by the Commission and is requesting the tariffs be applied in a discriminatory manner. However, the Commission is authorized by statute to approve the tariffs which are found to be in the public interest even if those tariffs work a disadvantage to a category of customers.

A. *Texas Clearly Articulates and Affirmatively Expresses Southwestern Bell's Conduct as State Policy.* (First Prong of *Midcal*).

As the Fifth Circuit stated in the first appeal, the first prong of the *Midcal* test is plainly satisfied in the instant case. Texas has clearly articulated a policy to regulate telephone rates.[4] The Public Utility Regulatory Act ("PURA"), Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1989), is devoted to the regulation of ratemaking and other practices of public utilities, (such as Respondent), and specifically displaces federal antitrust laws, as Section 2 provides.

It is the policy of the State of Texas to protect the public interest in having adequate and efficient telecommunications service available to all citizens of the state at just, fair and reasonable rates and to promote competitiveness. PURA §13(a). Thus, the Commission is given exclusive original jurisdiction over the business and property of telecommunications utilities in the State of Texas. PURA §18(b). Southwestern Bell, like other telecommunications common carriers, is required to file proposed tariffs describing all rates, rate structure, regulations and rules before a service

---

[4]The term "rate" as used in PURA includes any rules, regulations, practices, or contracts affecting any compensation, tariff, charge, fare, toll, rental. PURA §3(d) (Appendix, at 58h).

can be offered to the public. PURA §32. The Commission has the responsibility to review such rates, regulations, rules, and standards for such services when they are filed and to allow them to become effective only if they are just, fair and reasonable and comply with the public interest standard of the PURA. PURA §§18, 35, 37, 38; *DFW Metro Line Services* 901 F.2d at 1268, n.4. Interested parties are given notice of rate changes and proposed services and may intervene in the proceedings before the Commission. PURA, §§32, 38; and PUC Substantive Rules.

If the Commission is doubtful in regard to reasonableness of rates, it has the power and duty to conduct an investigation, and if it comes to the conclusion that a tariff is not in compliance with PURA, it may order the tariff canceled, or modified, as the circumstances warrant. PURA §§16(A), 37, 42, 43(f). If the tariff is acceptable, it must be fully enforced. PURA §§37, 43. A tariff has the force and effect of law. *Carter v. American Telephone & Telegraph Co.*, 365 F.2d 486 (5th Cir. 1966), *cert. den.*, 385 U.S. 1008 (1967).

PURA makes it unlawful for a public utility to charge rates other than those authorized by the tariffs. PURA §31. The PUC has the power to insure compliance with the obligations of public utilities under the PURA. PURA §37.

The Commission also has many of the powers of a court of law. Any affected person may complain to the PUC in writing, setting forth any act or thing done or omitted to be done by any public utility in violation of any tariff and may obtain a hearing. PURA §§83(a), 84. A party may complain of any anticompetitive or discriminatory practices by a public utility. PURA makes it unlawful for a public utility to grant any preference or prejudice as to its rates or services or to discriminate in the selling, leasing or performance of its services to entities in competition with the public utility.

PURA §§45-47. The Commission has the ability to grant interim relief to maintain the status quo pending the resolution of any complaint. PURA §16(a). The Commission may also call and hold hearings, administer oaths, receive evidence at hearings, issue subpoenas to compel the attendance of witnesses and the production of papers and documents and make findings of fact and decisions with respect to administering the provisions of PURA or the rules, orders or other actions of the Commission. PURA §16(a). The Commission may enjoin violation of its regulations by requesting the Attorney General to seek an injunction in the courts. PURA §§71-77. Appeals from Commission orders may be taken to the state district courts. PURA §69.

The Texas statutory scheme is clearly consistent with that reviewed by this Court in *Southern Motor Carriers.* In addition, Texas courts have explained the policy behind this regulatory structure as one of limiting competition sufficiently to guarantee stability of the public utilities, while retaining enough competition to serve consumers and avoid discrimination. *See Texas Alarm & Signal Ass'n. v. PUC,* 603 S.W. 2d 766, 772 (Tex. App.- Austin 1985, no writ) (the PUC may design rates and services that are reasonable and serve the public interest, even if somewhat discriminatory); *Amtel Communications, Inc. v. Public Utility Commission of Texas,* 687 S.W.2d 95, 99 (Tex. App. — 3rd Dist. 1985, no writ) (PURA requires that the PUC implement a public policy that the monopoly power of a public utility shall be held only under state license and regulatory control; there is also a public policy against unreasonable discrimination in utility services but, in some instances, the PUC may implement a policy that is reasonably discriminatory if based upon the public interest); *see also Public Utility Commission of Texas v. AT&T Communications, Inc.,* 777 S.W. 2d 363 (Tex. 1989).

PURA recognizes the appropriateness of classifications among customers of a regulated public utility. For instance, certain businesses that furnish service only to themselves or to tenants as an incident of tenancy, (such as hospitals, hotels and motels), but who do not resell to others, are excluded by PURA from regulation as utilities. PURA, §3(3). There is no question that Texas intends to "displace competition with a regulatory structure." *See Southern Motor Carriers*, 471 U.S. at 64-65; *see also Sonitrol*, 629 F. Supp. at 1091-92 where plaintiff alleged that AT&T manipulated tariffs and restructured pricing to prevent plaintiff from competing in the alarm services market, the court held that the cause of action was barred by the state action doctrine because the state articulated a policy to regulate telephone rates).

Petitioner's brief at page 11 cited *Public Utility Commission of Texas v. AT&T*, 777 S.W. 2d 363 (Tex. 1989) for the proposition that §§45 and 47 of PURA apply only to the utility and not to the Commission. However, the next sentence in that opinion goes on to confirm, "Section 38 of the PURA is the section that provides guidance to the Commission in designing a rate structure." (*Id.* at 367).

Petitioner has also misapplied *Southern Motor Carriers*, *Parker* and *Midcal*. USM's analysis of these cases depends upon its assertion that there is no intention by the State of Texas to "displace competition" in the telecommunications field. Again, Section 2 of PURA could not be more explicit:

> . . . the normal forces of competition which operate to regulate prices in a free enterprise society do not operate; and that therefore utility rates, operations and services are regulated by public agencies with the objective that such regulation shall operate as a substitute for competition.

The above-quoted language is found under Article 1, which states the "Legislative Policy" for the Act. This mandate was not abrogated by §18(a), rather the Commission is charged with regulating the utility by setting "just, fair and reasonable rates" and promulgating rules and policies that are appropriate in a competitive environment. It is no less state action for the Commission to carry out the public policy stated in PURA §18(a), just because competitors may be present in a given environment. This comprehensive regulatory mandate is not unlike the regulatory structure in Florida. See *Davis v. Southern Bell,* 755 F. Supp. 1532 (S.D. Fla. 1991). The *Davis* case supports Southwestern Bell's argument, as it is yet another recent example of a Court holding that the state action doctrine barred the stated claims against that telecommunications utility.

Petitioner repeatedly relies upon Section 47 of PURA for the proposition that the *entire Act* is designed to "protect competitors from the anticompetitive conduct of public utilities". USM misapplies Section 47. Under Section 47, Southwestern Bell must offer its services on a nondiscriminatory basis. Setting tariff rates for these services and holding the utility to charging these same rates to every similarly situated customer is the method by which the Commission ensures that Section 47 is enforced. This section does not relieve the Commission of its extensive regulatory mandate. Rather, it increases the scope of its purview to include an examination of discriminatory impact in its goverance of utilities. Section 47 prohibits Southwestern Bell from unreasonable discrimination in *favor* of USM (or any customer) by charging it lower local exchange rates for its use of Southwestern Bell's services to provide an interexchange service, when it cannot charge that same rate to a competing interexchange carrier.

B. *Texas Actively Supervises Southwestern Bell's Conduct.* (Second prong of *Midcal*).

As recognized by the Fifth Circuit, the second prong of the *Midcal* test, the active supervision prong, is also met under the circumstances at bar. The second prong requires that the state actively supervise its regulation of anticompetitive conduct. *Southern Motor Carriers*, 471 U.S. at 57. The Court in *Southern Motor Carriers* stated that the regulatory commissions of all four states involved in ratemaking had the ultimate authority and control over all the rates. (*Id.* at 51.) The Court of Appeals found, and the government conceded, that this amounted to active supervision. (*Id.* at 62.)

Like the regulatory commissions in *Southern Motor Carriers*, the Texas Commission has the ultimate regulatory authority to approve or disapprove rates, (which includes by definition, regulations and services) to be offered by those in the telecommunications industry. The "active supervision" prong of the test is satisfied in the instant case just as it was in *Southern Motor Carriers*. There, the four collective-ratemaking statutes were "prior approval" statutes. Under them, (1) common carriers were required to submit rates for approval, (2) the rates became effective if the state agency took no action within a specified time period, and (3) if a hearing was scheduled, a rate became effective only after affirmative agency action. The Court determined that the state agencies "thus have and exercise ultimate control over all intrastate rates." (*Id.* at 51). The same is true for Texas' regulatory structure.

The Commission additionally has the power to require registration of telecommunications carriers and other providers (e.g., resellers) of telecommunications services and conduct investigations as are necessary to determine

the scope of competition in the telecommunications industry. PURA §18(c). The Commission has supervisory powers over the record keeping, accounting and reporting methods of public utilities. PURA §§27-28. In that respect, the Commission may conduct inspections and examine a public utility's records under oath, compel production of records and inquire into the management and affairs of public utilities. The Commission also controls the issuance of certificates of convenience and necessity which must be obtained by any public utility providing services in Texas. PURA §§49-62; *see Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 825 (9th Cir. 1982), *cert. den.*, 456 U.S. 1011 (1982) holding "active supervision" requirement satisfied, observing that administrative agency was under a duty to investigate racing permit applications which were subject to specified criteria.

All of the administrative decisions of the Commission are subject to the scrutiny of the Texas courts. PURA §69; *See Public Utility Commission of Texas v. AT&T Communications, Inc.*, 777 S.W. 2d 363 (Tex. 1989); *Texas Alarm & Signal Ass'n. v. PUC*, 603 S.W.2d 766 (Tex. App.-Austin 1985, no writ); *Amtel Communications, Inc. v. PUC*, 687 S.W.2d 95 (Tex. App.-3rd Dist. 1985, no writ). The *AT&T*, *Texas Alarm* and *Amtel* cases alone demonstrate that Texas *is* actively supervising this regulatory scheme. In *Amtel Communications, Inc.*, the court gave a painstaking, detailed analysis of the requirements of the regulatory scheme. While Petitioner quotes from the background discussion in *Amtel*, the court specifically noted: ". . . in some circumstances, discrimination may be in the public interest and there is, in such circumstances actually a public policy in favor of discriminatory practices by a public utility regulated under the statute, even with regard to basic utility services." *Amtel Communications, Inc. v. PUC*, 687 S.W.2d 95, 101 (Tex. App. 3rd Dist. 1985, no writ.) These cases

also demonstrate the Attorney General's involvement in the regulatory arena — again showing the state's active supervision over the regulatory structure. *See Monarch Entertainment Bureau, Inc. v. New Jersey Highway Authority,* 715 F. Supp. 1290 (D.N.J. 1989) aff'd without op. 893 F.2d 1331 (1989) (active supervision requirement satisfied where Highway Authority's actions subject to review by the governor). Under PURA, §71, if the Commission believes that a utility is not complying with PURA or any rule, regulation or order, the Attorney General shall bring an action on behalf of the Commission to enjoin the commencement or continuation of the Act.

The second prong of the *Midcal* test, that the state actively supervises telecommunications regulation activities, is satisfied.

The *Patrick, Duffy, Hallie* and *Cantor* cases cited by Petitioner in its Brief in support of its position that the state action doctrine are inapposite. In *Patrick v. Burget,* 486 U.S. 94 (1988) and *324 Liquor Corp. v. Duffy,* 479 U.S. 335 (1987), this Court held only that the second prong of the *Midcal* test was not satisfied because the states did not actively supervise the conduct in question, unlike the Commission's active supervision of Southwestern Bell's enforcement of its tariffs. In *Hallie v. Eau Claire,* 471 U.S. 34 (1985), superseded by statute as stated in *Sakamoto v. Duty Free Shoppers Ltd.,* 764 F.2d 703 (9th Cir. 1985), *cert. den.,* 475 U.S. 1081 (1986), this Court, discussed at length the two-part *Midcal* test, and held that the state action doctrine applied. Such holding supports Southwestern Bell's position in this case. Finally, in *Cantor v. Detroit Edison Co.,* 428 U.S. 579 (1976), this Court determined that the state did not clearly and articulately express the questioned conduct as state policy in contrast to the instant case. Here the Commission has

the power to approve the tariffs submitted by a public utility if in the public interest, even if such tariffs work a disadvantage to a particularly situated customer. PURA, Sec. 16(a) provides:

> The commission has the general power to regulate and supervise the business of every public utility within its jurisdiction and to do all things, whether specifically designated in this Act or implied herein, necessary and convenient to the exercise of this power and jurisdiction. The commission shall make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules governing practice and procedure before the commission. The commission may call and hold hearings, administer oaths, receive evidence at hearings, issue subpoenas to compel the attendance of witnesses and the production of papers and documents, and make findings of fact and decisions with respect to administering the provisions of this Act or the rules, orders, or other actions of the commission.

See also PURA, Sec. 71.

Again, on page 16 of its Petition, USM has mischaracterized the central issue in this dispute by citing Respondent's "threat to put Petitioner out of business." Petitioner can continue to operate its business if it orders Southwestern Bell services from the Access Service tariff. Petitioner cannot continue to operate its business by misusing and reselling Southwestern Bell's local exchange services in violation of its tariffs.

Petitioner should find it difficult to argue the Commission is not actively supervising Respondent's conduct. These parties have just concluded a three-week evidentiary hearing before the Commission in order to determine the following points:

1. Whether USM is in violation of the tariffs under which it is receiving service from Southwestern Bell,
2. Whether the relevant provisions of those tariffs are unreasonable or in any way in violation of any provision of law, within the meaning of PURA Section 42,
3. If the answer to the first two questions are in Southwestern Bell's favor, whether Southwestern Bell should be permitted to terminate USM's existing service under those tariff provisions pursuant to PUC Substantive Rule 23.46.

USM's arguments have been heard by the Commission and will be decided in that forum. Interim relief maintaining the status quo was ordered by the Commission two years ago pending the outcome of the complaint proceeding. While the Commission cannot order money damages, it can and will interpret the validity and application of the tariffs.

3. *THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL.*

The fundamental flaw in Petitioner's argument at pages 18-25 is that it ignores the fact that Texas *has* displaced competition as set forth in Section 2 of PURA. Respondent would agree with Petitioner's conclusion that *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) involved one isolated competitive area of the electricity industry, the supply of light bulbs.

However, in the present case the services at issue are the fundamental local exchange services that are the crux of regulation in Texas. These services are not a minor sideline for Respondent, or, as this Court characterized the light bulb exchange program in *Cantor*, ". . . a program that is primarily Respondent's, not the Commission's . . .". The circumstances in this case are widely divergent from those in

Cantor. In *Cantor,* this Court recognized the light bulb market as being essentially unregulated. That cannot be said of the services at issue herein.

Further, Petitioner is wrong when it states on page 21 of its brief that no decision has contradicted the holdings and reasoning in *Cantor. Southern Motor Carriers* expressly rejected certain premises of *Cantor* referring to the *Cantor* language setting forth the "necessity" requirement as "questionable dictum". *Southern Motor Carriers,* 471 U.S. at 517, n. 21. The Fifth Circuit folowed this limitation of *Cantor* in *Benton, Benton and Benton v. Louisiana Facilities Public Authority,* 897 F.2d 198 (5th Cir. 1990), *cert. den.* ___U.S.___, 111 S.Ct. 1619 (1991). The 10th Circuit has also followed *Southern Motor Carriers* rather than *Cantor* in *Lease Lights, Inc. v. Public Service Co. of Okla.,* 849 F.2d 1330, 1332 (10th Cir. 1988), *cert. den.,* 488 U.S. 1019 (1989) ("[Plaintiffs] ignore, however, that the Supreme Court has explicitly softened the previously stringent requirements for state action immunity." (citing *Southern Motor Carriers).*

The case upon which USM relies, regarding the filed tariff issue, *Essential Communications v. American Tel. & Tel. Co.,* 610 F.2d 1114 (3rd Cir. 1979), concerns the federal regulatory scheme and predates the controlling authority of *Southern Motors,* (1985) and *Midcal,* (1980).

Essential also keys on the fact Plaintiff was a competing equipment provider, not a customer. In the case at bar, USM is inappropriately using and reselling Southwestern Bell's regulated services in violation of its tariffs, whether as a customer or as a competitor. This circumstance would be comparable if *Essential* had been *reselling* AT&T's equipment, rather than using its own. In *Essential,* there was no active FCC approval of the tariff at issue.

A similar challenge was unsuccessfully raised by an equipment provider in Texas in *Amtel Communications v. PUC*, 687 S.W. 2d 95 (Tex. App. 3rd Dist. 1985, no writ). There, the equipment provider filed a complaint at the PUC against Southwestern Bell charging the combined effects of Southwestern Bell's tariff charges and certain business policies were discriminatory and anticompetitive. (*Id.* at 97). The PUC denied Amtel's claims and Amtel sued for review according to PURA §69. The Court upheld the PUC after a detailed analysis of PURA and the competing considerations the PUC must take into account in rendering a decision. The Court stated:

> [T]he antidiscrimination and antitrust criteria of PURA §§38, 45 & 47 are not absolute. The Commission is allowed discretion and judgment in such matters for it is also required under the statute to implement the contraries of these public policies . . .

(*Id.* at 109).

This Texas Court's evaluation of PURA in *Amtel* is more instructive to this Court on the issue of discrimination than is the treatment accorded an equipment provider under a different regulatory scheme in *Essential*.

The Texas Supreme Court affirmed the PUC's balancing of competitive and other regulatory considerations in *Public Utility Commission of Texas v. AT&T Communications, Inc.*, 777 S.W. 2d 363 (Tex. 1989). It cannot be argued that the PUC does not or cannot take into account the competitive impact of Southwestern Bell's actions as a regulated utility. In *Public Utility Commission of Texas v. AT&T Communications, Inc.*, the Court noted:

> The hearing examiner's report in both cases expressly stated the interexchange carriers failed to prove that the proposed access charge system placed them at a competitive disadvantage, and the Commission adopted these findings.

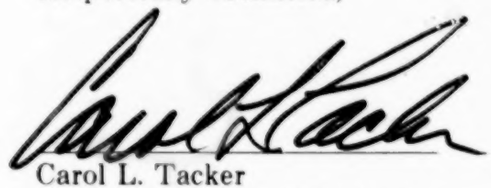
(*Id.* at 366).

In the present case, more than tariff filings are at issue. Also at issue is the Commission's authority under PURA to establish terms and conditions (as included in the term "rate") and to resolve disputes concerning the force and applicability of tariffs in complaint proceedings, such as the hearing these parties concluded on February 17, 1992.

CONCLUSION

The decision by the Fifth Circuit is appropriate and does not conflict with decisions of Courts of Appeal or of this Court on the essential issue of immunity. For the reasons stated in this Response, Southwestern Bell prays the Court deny the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



Carol L. Tacker
Southwestern Bell Telephone Company
One Bell Plaza, Room 2900
208 South Akard
Dallas, Texas 75202
(214) 464-2219

ATTORNEY FOR RESPONDENT
SOUTHWESTERN BELL
TELEPHONE COMPANY

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the Respondent's Brief In Opposition to the Petition for Writ of Certiorari were personally served upon the attorney for Petitioner, U.S. Metroline Services, Inc., 1100 St. Paul's Place, 750 N. St. Paul St., Dallas, Texas 75201, by courier, on this 4 day of March, 1992.

Carol L. Tacker

Supreme Court, U.S.
FILED
MAR 23 1992
OFFICE OF THE CLERK

(4)

No. 91-1269

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

U. S. METROLINE SERVICES, INC.

Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF

RAY G. BESING
Law Offices of Ray G. Besing, P.C.
Texas State Bar Card 02262000
1100 St. Paul Place
750 N. St. Paul
Dallas, Texas 75201
214/220-9090
214/220-1202 fax

Counsel for Petitioner
U. S. Metroline Services, Inc.

March 23, 1992

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED ii

REPLY AND OBJECTIONS TO RESPONDENT'S STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

1. Respondent is not immune from antitrust liability under the state action doctrine. 3

2. In its per curiam opinion, the Fifth Circuit did not hold that Respondent Bell is immune from antitrust liability under the state action doctrine; and the Court wrongfully applied the law of the case to the Rule 12(b)(6) dismissal 6

3. Respondent Bell has misrepresented the Record 9

CONCLUSION 9

TABLE OF AUTHORITIES CITED

Page

United States Supreme Court decisions:

California Retail Dealers Assn. v. Midcal Aluminum, Inc.,
445 U.S. 97, 100 S.Ct. 937 (1980) 2, 3, 4, 5, 6

Cantor v. Detroit Edison Co.,
428 U.S. 579, 96 S.Ct. 3110 (1976) 4-5, 6

Conley v. Gibson,
355 U.S. 41, 78 S.Ct. 99 (1957) 7, 9

DFW Metro Line Services v. Southwestern Bell,
901 F.2d 1267 (5th Cir. 1990),
cert. denied, 111 S. Ct. 519 (1990) 7

Hallie v. Eau Claire,
471 U.S. 34, 105 S.Ct. 1713 (1985) 6

Parker v. Brown,
317 U.S. 341, 63 S.Ct. 307 (1943) 2

Patrick v. Burget,
486 U.S. 94 (1988) 4

Southern Motor Carriers Rate Conference v. United States,
105 S.Ct. 1721 (1985) 4, 5

United States Courts of Appeal decisions:

Angoon v. Hodel,
803 F.2d 1016 (9th Cir. 1986),
cert. denied, 484 U.S. 870 (1987) 8

Benton, Benton and Benton v. Louisiana Public Facilities Authority,
897 F.2d 198 (5th Cir. 1990) 5, 6

TABLE OF AUTHORITIES CITED (Con't)

Page

Board of Trade of the City of Chicago v. Commodity Futures Trading Commission, 605 F.2d 1016 (7th Cir. 1979), *cert. denied*, 466 U.S. 928 (1980) 8

Ducey v. U.S., 830 F.2d 1071 (9th Cir. 1987) 8

Kennedy v. City of Cleveland, 797 F.2d 297 (6th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987) 8

Milgard Tempering, Inc. v. Selas Corp. of America, 902 F.2d 703 (9th Cir. 1990) 7

Sierra Club v. U.S. Army Corps of Engineers, 771 F.2d 409 (8th Cir. 1985) 9

Constitution, Statutes and Rules:

Fed.R.Civ.P. 12(b)(6) 1, 2, 3, 6, 7, 8, 9

Texas Public Utility Regulatory Act ("PURA"), Tex.Rev.Civ.Stat.art. 1446(c) 1, 2, 3, 4

PURA, Section 2 . . . . . 3, 6

PURA, Sections 3(c)(2)(A) and (B) 6

PURA, Section 46 3

REPLY AND OBJECTIONS TO RESPONDENT'S STATEMENT OF THE CASE[1]

At pages 4, 5 and 6 of its Statement and, later, at pages 13, 14, 25 and 26 of its Brief, Respondent persistently makes statements outside the Record, and irrelevant to an appeal of a dismissal of Petitioner's Complaint under Rule 12(b)(6). Respondent's allusions to an "audit"; to Petitioner "reselling" local telephone service; to the operation of a radio common carrier service by an unrelated, earlier company; to what Respondent "believed" about that other company [pp. 4,5 & 6]; to "no new technology issues" [pp. 13, 14]; and to Respondent's various tariffs and a PUC adjudicatory hearing on tariff issues — none of this has any bearing on Petitioner's suit in the lower court for antitrust violations and damages. Moreover, none of those extraneous subjects have anything to do with the errors of law committed by the courts below.

SUMMARY OF ARGUMENT

The District Court and the Circuit Court made egregious errors in using the state action doctrine to grant and affirm Respondent Southwestern Bell's Rule 12(b)(6) motion to dismiss the antitrust causes of action well-stated in Petitioner's Amended Complaint.

First, both courts entirely ignored the proper standards in rulings on Rule 12(b)(6) motions to dismiss, established by this Court in *Conley v. Gibson*, 351 U.S. 41, 78 S.Ct. 99 (1957).

Second, to excuse the application of proper *Conley* standards, both courts erroneously used the "law of the case" to justify a dismissal of Petitioner's Complaint, when that doctrine does not bridge the gap between a preliminary injunction proceeding and a subsequent disposal of the main case on the merits.

Thirdly, just as the courts below ignored fundamental procedural standards in wrongly dismissing Petitioner's Complaint, they declined to make a serious analysis — or really

---

[1] Please see Appendix of Petitioner, Section I, for the listing of parent companies and subsidiaries of Southwestern Bell pursuant to Rule 29.1.

any analysis — of the statute at issue, the Texas PURA. Rather, the courts below misidentified the *challenged conduct* of Respondent: the arbitrary threat to cut off the telephone lines of Petitioner, a competitor in the competitive market of metro line service. Inexplicably, the courts below decided Petitioner was challenging the Respondent's *rate* tariffs, when there is no remote suggestion of such a claim by Petitioner anywhere in its Amended Complaint.

From that entirely erroneous premise, the courts below applied, without analysis, the *Parker v. Brown* state action doctrine, effectively *immunizing* Southwestern Bell Telephone Company from the duty of responsible conduct under the federal antitrust laws.

The Respondent's arguments are clumsy and misguided efforts to bolster the courts below, by grossly misapplying the *Midcal* test and by concocting purportedly "factual" statements from outside the record. Indeed, Respondent seems not to understand either (1) that this case is an appeal of the Rule 12(b)(6) judgment of dismissal of Petitioner's Amended Complaint and, accordingly, (other than the text of the Amended Complaint itself, R -18) the Record is not an issue at all; or (2) that it is the articulation of policy of the State, *by* the State, and the active supervision of that policy of the State, *by* the State, as found in the *PURA itself*, which is the proper object of the *Midcal* two-pronged analysis. Respondent apparently thinks that *Midcal* is to be applied to Respondent's *own* "enforcement of rates" which Respondent characterizes as the *policy* of the State. The Respondent's conduct is the challenged conduct, not State policy.

Respondent's confusion and misstatements about Rule 12(b)(6) law, the identification of the correct subject of analysis and the purpose of a *Midcal* analysis permeate Respondent's Brief in Opposition.

In this Reply, Petitioner hopes to clarify the confusions presented by Respondent in its attempt to excuse the multiple errors made by the lower courts in a straightforward antitrust damages case.

ARGUMENT

1. Respondent is not immune from antitrust liability under the state action doctrine.

Respondent's arguments regarding the applicability of the two-pronged *Midcal* test to the Texas PURA are misplaced and singularly unpersuasive. Instead of dealing with the specific *anticompetitive conduct alleged in the Complaint*, Respondent argues about the "rate-making" features of the PURA — features which are not relevant to this lawsuit. Respondent makes the ludicrous claim that Southwestern Bell's "obligation to enforce its tariffs as they apply to Petitioner or any other similarly situated customer and to charge the appropriate tariffed rate for a service is clearly articulated and affirmatively expressed as state policy, (PURA sections 2, 46) ..." [Respondent's Brief at p.14-15]. The argument is both irrelevant and wrong.

A. In attempting to apply the first prong of the *Midcal* test, Respondent's brief (pp. 12-21) betrays a seriously confused application of *Midcal*.

First, Respondent apparently thinks that the "challenged conduct" of Respondent is its "enforcement" of its rate tariffs. Petitioner's Amended Complaint does *not* remotely address or challenge Respondent's rates; or how rates were set; or whether some rates are high and others low; or whether any rates of Respondent are or are not reasonable or lawful. Those are matters for a regulatory agency, the Texas PUC.

Here, Petitioner's Amended Complaint (R.18) challenges very specific conduct of Respondent: threatening to cut off Petitioner's telephone lines. That is the "challenged conduct" which is to be addressed in applying the *Midcal* test. Because Respondent's red herring — its claimed enforcement of its own rate tariffs — was the *excuse* Respondent gave in its *brief* to the trial court (R.21), that does not alter the allegations in Petitioner's Amended Complaint. And it is *only the allegations in Petitioner's Amended Complaint* which are to be reviewed in ruling on a Rule 12(b)(6) motion to dismiss that complaint.

Secondly, it is not Respondent's conduct in "enforcing its rate tariffs" which is the proper subject of a *Midcal* analysis of a "clearly articulated state policy"; rather, the application of the first prong of the *Midcal* test required the courts below to analyze the Texas *statute* — the PURA. The courts below should have reviewed that statute to determine if *it* represented a clearly articulated policy of the state to permit Respondent's challenged conduct: threatening to cut off the telephone lines of a competitor.

Respondent wrongly relies on *Southern Motor Carriers Rate Conference v. United States*, 105 S.Ct. 1721 (1985), for the proposition that Texas intended to displace competition with a "permissive" regulatory structure. The Court in *Southern* was dealing with what was, on its face, "an anticompetitive regulatory system" which, by state statute, permitted large "rate bureaus" of motor carriers to collectively engage in overt price fixing agreements. Moreover, in discussing *Midcal*, the Court in *Southern* stated that the first prong of the *Midcal* test is satisfied: "*As long as the state as sovereign clearly intends to displace competition in a particular field with a regulatory structure* . . . ." *Id.*, 105 S.Ct. at 1731 (emphasis added). There is literally nothing in PURA or its construction by the Texas courts suggesting any intention of Texas to "displace competition" in the field of telecommunications in general, or in the competitive metro services market in particular.

B. With regard to the second prong of *Midcal*, Respondent must show that the State of Texas exercises "ultimate control over challenged competitive conduct" and that the "state officials have and exercise power to review *particular anticompetitive acts* of private parties *and disapprove those* that fail to accord with state policy." *California Retail Dealer's Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937 (1980); *Patrick v. Burget*, 486 U.S. 94, 101 (1988).

Respondent claims that the case before this Court should be distinguished from *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110 (1976), because the commission in this case has the

power to approve tariffs. But, so did the Michigan Commission; the distinction is a false one. Also, the mere power to approve tariffs is insufficient to meet *Midcal's* active supervision requirement. In *Cantor*, this Court held that:

> We concluded that neither Michigan's approval of the tariff filed by respondent, nor the fact that the lamp exchange program may not be terminated until a new tariff is filed, is a sufficient basis for implying an exemption from the federal antitrust laws for that program." *Id.*, 428 U.S. at 599, 96 S.Ct. at 3121.

Respondent erroneously asserts that "*Southern Motor Carriers* expressly rejected certain premises of *Cantor* referring to the *Cantor* language setting forth the 'necessity' requirement as 'questionable dictum'". (Respondent's Brief, p. 27) That is not correct. Footnote 21 in the *Southern Motor Carriers* opinion, 105 S. Ct. at 727, is only a rejection by the majority of an argument by the *dissent* to the effect that state regulatory programs are entitled to antitrust immunity only if an antitrust exemption is necessary to make the program work. In the same paragraph of the text of that opinion, however, the court *confirms* the second prong of its test in *Midcal* by stating: "Second, the state must supervise actively any private anticompetitive conduct ... This supervision requirement prevents the state from frustrating the national policy in favor of competition by casting a 'gauzy cloak of state involvement' over what is essentially private anticompetitive conduct." *Id.*, 105 S.Ct. at 1727. Clearly, this Court in both *Southern Motor Carriers* and *Cantor* was emphasizing the standard that officials of the State of Texas must actively supervise Bell's "private anticompetitive conduct".

Likewise, there is no merit to Respondent Bell's claim that *Southern Motor Carriers'* alleged "limitation of *Cantor*" is found in *Benton* (Respondent's Brief, p. 27). First, in *Benton, Benton and Benton v. Louisiana Public Facilities Authority*, 897 F.2d 198 (5th Cir. 1990), the Circuit Court was dealing with a suit by a law firm directly *against a public agency*, the Louisiana Public Facilities Authority, for conspiracy with others to monopolize the business of providing bond counsel services by bonds issued on

that public agency. The Circuit Court properly concluded that, because the Louisiana Public Facilities Authority is a state agency, the second prong of *Midcal*, active state supervision, is not required under this Court's decision in *Hallie v. Eau Claire*, 471 U.S. 34 (1985).

Further, this Court in *Cantor* was not dealing with a state agency, but rather with a *private party*, just as the courts here are dealing with the conduct of Respondent Bell. In fact, the Fifth Circuit, in *Benton*, described the *Cantor* decision as a holding by the this Court that "*... mere approval by a state ratemaking commission of a private utilities tariff which violated the Sherman Act was not compelled state activity beyond the reach of the Sherman Act.*" *Id.*, 897 F.2d at 204 (emphasis added). Thus, the Fifth Circuit has made it clear that a "public" utility is a "private party". *Benton* makes a clear distinction between a public agency and private parties, for the application of the second prong of *Midcal*. When the defendant is a private party, as here, both prongs of the *Midcal* test must be applied. Defendant Bell is a private company, which, due to its monopoly power in some markets, is a public utility subject to rate regulation by the Texas PUC in those markets. PURA Secs. 2 and 3 (c) (2) (A), (B), the latter section defining public utility in the communications field as a "dominant carrier" which has sufficient *market power* in *a* telecommunications market ... to enable such provider to control prices in a manner adverse to the public interest ..." (emphasis added).

Consistent with this Court's *Cantor* decision, a public utility cannot claim antitrust immunity merely because its tariff either has been filed with or approved by a state ratemaking commission. The Fifth Circuit's 1990 opinion in *Benton*, therefore, confirms a principle argument of Petitioner.

2. **In its per curiam opinion in the first appeal, the Fifth Circuit did not hold that Respondent Bell is immune from antitrust liability under the state action doctrine; and the Court wrongfully applied the law of the case to the Rule 12(b)(6) dismissal.**

At pages 8-12 of the Respondent's Brief, Respondent Bell heavily relies upon a footnote in the Circuit Court's *per curiam* order in the first appeal dealing with injunctive relief, *DFW Metro Line Services v. Southwestern Bell*, 901 F.2d 1267 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 519 (1990). However, the only *holding* of the Fifth Circuit was that Petitioner had not proved the requisite element of irreparable injury (which was the subject of the bulk of the oral argument before the Panel on April 3, 1990). The Respondent argues that footnote 6 of the Court's *per curiam* opinion became the "law of the case". Whether as an afterthought, a comment or otherwise — but clearly only dictum — footnote 6 of the Circuit Court's *per curiam* opinion did not become the "law of the case".

This appeal is, in part, from the Circuit Court's erroneous use of the "law of the case" in the injunction proceeding to affirm the trial court's later Rule 12(b)(6) dismissal of Petitioner's antitrust damage suit. Granting and affirming the motion to dismiss means that both courts below necessarily ruled, as a matter of law, that "... it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief". *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Contrary to Respondent's assertions, *Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703 (9th Cir. 1990), supports Petitioner's position. The *Milgard* court had held in a prior appeal of the case that: "Pursuant to Section 28.1(f) of the purchase contract in Wash. Rev. Code, 4.84.330, [Selas] being the prevailing party herein, is entitled to reasonable attorneys' fees and costs." *Id.*, 902 F.2d at 715. In the subsequent appeal, the Ninth Circuit determined that this language about the "prevailing party" was dicta and therefore not the "law of the case".

The same principle applies to the case here. Footnote 6 was not necessary to the result reached in the *per curiam* opinion of the Fifth Circuit. Therefore, it should not be the law of the case in the second appeal. That is because the law of the case doctrine gives no preclusive effect to *dicta*. *Ducey v. U.S.*, 830 F.2d 1071 (9th Cir. 1987).

Likewise, *Kennedy v. City of Cleveland*, 797 F.2d 297 (6th Cir. 1986), *cert. denied*, 479 U.S. 103 (1987), supports Petitioner's argument that it is error to apply a holding in an earlier preliminary *injunction* proceeding as the law of the case in a subsequent trial (or disposition) on the merits of an antitrust damage suit. Respondent is just wrong. The court in *Kennedy* asserted that even an adverse decision with respect to *dismissal* or summary judgment (on a defense of immunity) does not preclude the "interposition of the defense of immunity as a defense to liability at the trial on the merits." *Id.*, 797 F.2d at 300. Thus, a court's earlier decision with respect to a motion for summary judgment or for dismissal is not the "law of the case" in a subsequent trial on the merits.

Board of Trade of the City of Chicago v. Commodity Futures Trading Commission, 605 F.2d 1016 (7th Cir. 1979), *cert. denied*, 466 U.S. 928 (1980), also supports Petitioner's position. That court stated that since a prior order reflected a discretionary ruling by the Court "*and not with respect to a plenary review of the merits* . . . ." it was not the law of the case in subsequent proceedings. *Id.*, 605 F.2d at 1020. Thus, a discretionary ruling by the trial court on an injunction does not become the law of the case in a subsequent trial (or Rule 12(b)(6) motion) on the merits.

Angoon v. Hodel, 803 F.2d 1016 (9th Cir. 1986), *cert. denied*, 484 U.S. 870 (1987), supports Petitioner's position. *Angoon* states the general rule that decisions on preliminary injunctions do not constitute the law of the case in a subsequent trial on the merits. Moreover, the *Angoon* court explained that it did not depart from this general rule, but rather considered the issues independently from its consideration of the same issues in the prior appeal, and simply came to the same conclusions.

Respondent claims that *Sierra Club v. U. S. Army Corps of Engineers*, 771 F.2d 409 (8th Cir. 1985), is inapposite to the case here. However, *Sierra Club* is important because it distinguishes the burden of proof required of a plaintiff in a preliminary injunction action from the legal standards which must be applied in a motion to dismiss (or a trial) on the merits. A decision - not on the merits - which disposes of a motion for a preliminary injunction is not the law of the case on a substantive issue on the merits. The courts below committed reversible error because they disregarded the critical differences between the tests applicable to an application for a preliminary injunction and the strict tests which must be satisfied before granting a Rule 12(b)(6) motion to dismiss. The rigorous standard of *Conley v. Gibson*, *supra*, in a Rule 12(b)(6) situation is far different from the element of "the likelihood of success on the merits" in a preliminary injunction matter.

3. **Respondent Bell has misrepresented the Record.**

It is axiomatic that review of a 12(b)(6) motion deals with the *legal sufficiency* of the Plaintiff's *pleading*, not with facts. Yet, Respondent purports to recite "facts" throughout its Brief in Opposition. Simply put, the facts are not at issue, only the *legal sufficiency* of Petitioner's Amended Complaint, to which Respondent did not file an answer.

One particularly offensive example is Respondent's allusion to the "parties have just concluded a three week evidentiary hearing before the Commission . . . ." (Respondent's Brief, p. 25). This comment is in violation of Supreme Court Rule 24, there being nothing in the Record to support this claim.

CONCLUSION

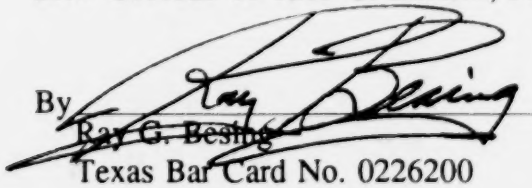
At the heart of Respondent's argument is the wrong notion that state action immunity can apply to *any* activities or conduct directly or remotely related either to the rate tariffs of Respondent Bell or the *rate-making* functions of the state regulatory agency, the PUC. To support this erroneous idea, Respondent Bell made various claims in its trial brief on the injunction issue (R.23).

These bare assertions in a brief were relied upon by both courts below in disposing of the Plaintiff's lawsuit by claiming the Petitioner was challenging the ratemaking activities of Respondent Bell and the PUC. Of course, the Plaintiff's Amended Complaint (R.18; *See* particularly, R.18 at pp. 76-79 and paragraph 11 therein, together with the sworn affidavits, exhibits B and C attached to the original complaint (R.1)) alleges nothing of the kind. Rather, the Plaintiff's complaint alleges the private anticompetitive conduct of Defendant-Respondent Bell in threatening to cut off the telephone lines of a competitor who, as a customer of Bell, had paid his telephone bills every month. That is the "challenged conduct" which must be assessed in light of Respondent's trial brief claim that a state statute allegedly created immunity from the antitrust laws; not some other unpled conduct.

For the reasons stated in this Reply Brief, Petitioner respectfully prays that this Honorable Court issue its Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

LAW OFFICES OF RAY G. BESING, P.C.

By 
Ray G. Besing
Texas Bar Card No. 0226200

1100 St. Paul Place
750 N. St. Paul Street
Dallas, Texas 75201
(214) 220-9090

Counsel for Petitioner
U. S. Metroline Services, Inc.

Dated: March 23, 1992